Loyola University Chicago Law Journal

Volume 18
Issue 2 *Winter 1986 1985-1986 Illinois Law Survey*

Article 17

1986

Tort Reform Act

Michael A. Pope
Partner, Phelan, Pope & John

Jamie S. Freveletti
Assoc., Phelan, Pope & John

Tort Reform Act

*Michael A. Pope**
*and Jamie S. Freveletti***

TABLE OF CONTENTS

I. INTRODUCTION

On September 26, 1986, the Tort Reform Act,[1] was signed into law by Governor Thompson. This Act is Illinois' response to the perceived insurance crisis,[2] and effects a myriad of changes in the present law of negligence and strict products liability. It applies to causes of action accruing on or after November 25, 1986.[3]

---

* Partner, Phelan, Pope & John; B.S., 1966, Loyola University of Chicago; J.D., 1969, Northwestern University.

** Associate, Phelan, Pope & John; B.A., 1981, Northern Illinois University; J.D., 1985, IIT Chicago-Kent College of Law.

1. 1986 Ill. Legis. Serv. 84-1431 (West). The sections of the Act relevant to this article have been codified at ILL. REV. STAT. ch. 110, paras. 2-604.1, 2-611, 2-1003, 2-1101.1, 2-1116, 2-1117, 2-1118, 2-1205.1, 2-1207 (Supp. 1986). The Governor has been vocal in his support of legislative efforts concerning tort reform. Interview with Ms. Ellen Craig, Director of Citizens Assistance and Consumer Affairs (July 16, 1986).

2. Whether this crisis actually exists is open to debate. *See The Guilty Parties in the Great Liability Insurance Crisis*, ECONOMIST, Mar. 22, 1986, at 23; Kovach, *Insurance "Crisis" on Trial; Proposed Federal Legislation Spurs Retort*, INDUS. WK., Apr. 14, 1986, at 21; Alliance for Consumer Rights, *Briefing Book: The Facts About the Insurance Crisis; Stopping the Industry Ripoff*, May 23, 1986, at 24; Neubauer & Henke *Medical Malpractice Legislation; Laws Based on a False Premise*, 21 TRIAL 64 (1985).

3. ILL. REV. STAT. ch. 34, para. 429.7 (Supp. 1986). Article 10 of the Act, which pertains to automobile insurance, has an alternative effective date of January 24, 1987. *See* ILL. REV. STAT. ch. 73, para. 755.13 (Supp. 1986).

The Act alters the doctrines of joint and several liability,[4] modifies the collateral source rule,[5] limits the availability of punitive damages,[6] changes our present system of "pure" comparative negligence to "modified" comparative negligence,[7] and adds a federal rule 11 sanctions clause that parellels Federal Rule 11.[8] In addition to these changes, statutes governing municipal law are altered significantly. Because the Act applies only to causes of action accruing after November 25, 1986, its effects will not be apparent for some time.[9]

This article will discuss sections of the Act that change basic legal theories and practice in Illinois. It also will analyze the practical effects of those changes. Finally, the article will address the likely impact of the changes on the perceived insurance crisis.

II. The Statutory Changes in The Tort Reform Act

A. Changes in the Comparative Negligence Standard

Prior to passage of the Act, Illinois applied the pure comparative negligence doctrine in tort cases. The result of a judicial mandate,[10] the pure system of comparative negligence allowed a plaintiff to recover even though he or she was contributorily negligent. The percentage of the plaintiff's negligence reduced the damage award.[11]

The Illinois Supreme Court adopted the pure comparative negligence system in *Alvis v. Ribar*.[12] In *Alvis*, the court consolidated two auto accident cases to consider the fairness of the contributory negligence and comparative negligence systems. The supreme court considered the common law doctrine of contributory negligence unnecessarily harsh and reasoned that a system of comparative negligence would effectuate a socially desirable distribution of

4. Ill. Rev. Stat. ch. 110, paras.2-1117, 2-1118 (Supp. 1986).
5. *Id.* at para. 2-1205.1.
6. *Id.* at para. 2-604.1.
7. *Id.* at para. 2-1116.
8. *Id.* at para. 2-611.
9. Presently, the average personal injury complaint with a jury demand filed in the Law Division of Cook County takes eight years from the date of filing until the date of trial. Personal injury cases without a jury demand take four years to reach trial. The case load in the Law Division rose 16% from 1985 to 1986. Telephone interview with Judge A. Sorrentino, Presiding Judge Law Division, Circuit Court of Cook County (August22, 1986); Telephone interview with Frank Belmonte, Court Systems Manager (August 22, 1986).
10. Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).
11. *See* V. Schwartz, Comparative Negligence § 3.2 (2d ed.1986).
12. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

loss.[13] The court, however, had to decide whether it should adopt a pure or modified form of comparative negligence. In analyzing the merits of the pure and modified forms, the court reasoned that a defendant's liability should be determined by the percentage of his or her fault in relation to the ultimate damages.[14] The court concluded that a pure system of comparative negligence satisfied this goal because neither party escaped liability for his negligent acts.[15] The court rejected the modified form because it retained an aspect of contributory negligence that the court wished to avoid. The court stated that the modified form created a contributory negligence rule for those plaintiffs who are more than 50% at fault for their injuries.[16] Finally, the court noted that proponents of the modified form claim that it reduces insurance costs. The court responded by citing a study that found the difference in insurance rates between states with pure and modified systems to be minimal.[17]

The new Act rejects the system of pure comparative negligence developed in *Alvis* for a modified comparative negligence system. The pure system awards damages to a plaintiff regardless of his percentage of fault. This aspect of the pure form generated substantial criticism.[18] Now, in negligence actions and products liability actions based on strict liability, a plaintiff who is found to be more than 50% at fault in an action for personal injury or property damage is barred from recovery.[19] The new system is often called the greater fault bar approach[20] because the plaintiff recovers nothing if his or her fault exceeds the defendant's.[21]

Under the new system, a plaintiff will recover $25,000 if dam-

13. *Id.* at 17, 421 N.E.2d at 893. The court stated that "the concept of comparative negligence which produces a more just and socially desirable distribution of loss is demanded by today's society." *Id.*

14. *Id.* at 25, 421 N.E.2d at 897.

15. *Id.*

16. The *Alvis* court stated, "[w]e agree with the *Li* court that the '50% system' simply shifts the lottery aspect of the contributory negligence rule to a different ground." *Alvis*, 85 Ill. 2d at 27, 421 N.E.2d at 898 (citing Li v.Yellow Cab Co., 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975)).

17. *Alvis*, 85 Ill. 2d at 26, 421 N.E.2d at 897 (citing Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV.89 (1959)). Five years later, however, the legislature argued that the modified system would lower insurance costs that the pure system had raised. *See* JUDICIARY COMMITTEE OF ILLINOIS SENATE, CONFERENCE COMMITTEE REPORT, June 30, 1986, at lines 113-20 [hereinafter CONFERENCE COMMITTEE REPORT].

18. *See infra* note 23 and accompanying text.

19. ILL. REV. STAT. ch. 110, para. 2-1116 (1986).

20. W. PROSSER & P. KEATON, TORTS § 67, at 473 (5th ed.1984).

21. *Id.* Under another version of modified comparative negligence, the equal fault

ages are determined to be $50,000 and the plaintiff is found to be 50% at fault. A plaintiff who is found to be 51% at fault recovers nothing. The greater fault bar approach ensures that a plaintiff who is more at fault than the defendant will not recover damages.

The Act also requires an ultimate outcome jury instruction if a party requests one. If requested, the jury will be instructed in writing that the defendant shall not be found liable if the plaintiff is more than 50% of the proximate cause of the injury.[22] Ultimate outcome jury instructions in comparative negligence jurisdictions have been controversial because of their potential to skew a verdict. Critics of such instructions argue that the jury will return a logical verdict if it does not know the effects of a 51% finding. These critics believe that sympathy verdicts are avoided if the jury is unaware of the consequences of its finding.[23] Proponents of the instructions believe that an informed jury is less likely to speculate about the effect of its verdict.[24] The Act resolves this controversy in favor of informing the jury of the consequences of its decision.[25]

The change from pure comparative negligence to a modified version is an attempt by the legislature to reinstate a system based on fault.[26] This return to a fault system was recommended in a recent federal study.[27] Ostensibly, the change is intended to alleviate the

---

bar approach, the plaintiff recovers nothing if his or her fault is equal to that of the defendants. *Id.*

22. ILL. REV. STAT. ch. 110, para. 2-1107.1 (Supp. 1986).

23. *See* McGinn v. Utah Power & Light Co., 529 P.2d 423, 424 n.2 (citing case authorities supporting theory juries should not be instructed on the effect of their fact finding answers), *Dixon v. Stewart*, 658 P.2d 591 (Utah 1982).

24. Thomas v. Board of Township Trustees, 224 Kan. 539, 582 P.2d 271 (1978); V. SCHWARTZ, *supra* note 11, § 17.5.

25. ILL. REV. STAT. ch. 110, para. 2-1107.1 (Supp. 1986).

26. *See, e.g.*, CONFERENCE COMMITTEE REPORT, *supra* note 17, at line 276 (statement of Sen. Berman). Senator Berman's comments during debate on the proposed system illustrate the legislative interest in a system based on fault:

> On the point of view of [sic] . . . meaningful changes in the tort system, let me point out to you that we've addressed something that a lot of people felt should be changed and that is modified comparative fault; and sometimes these fancy titles mislead the public, but what that means in simple language is that if I'm involved in an automobile accident with another guy and I am more than half at fault, I cannot collect anything. A lot of people felt that that's the way the system ought to work.

Id.

27. *See* REPORT OF TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 61-62 (1986) [hereinafter POLICY REPORT]. In October 1985, the United States Attorney General established the Tort Policy Working Group. The Working Group, composed of representatives from ten agencies and the White House, was authorized to investigate the insurance crisis. The Working Group's findings were published in a report released in February 1986. *Id.* at 1. The Working Group noted tort

insurance crisis. Nevertheless, the new system may not achieve this goal.[28] Further, the modified system enriches a substantially negligent defendant who is less than 50% at fault. There is little justice in allowing a defendant who is 49% at fault to escape the consequences of his or her negligence.

Proponents of the modified system claim that it will facilitate settlements and reduce judicial administrative costs.[29] States that have changed from a pure to modified system, however, actually have shown a slight decrease in settlements.[30] Also, the claimed reduction in administrative costs is purely speculative and requires further study.[31]

In contrast, the pure comparative negligence system allocates liability according to fault. Each person in a lawsuit is held liable for his or her portion of fault. Because of this obvious fairness, it is not surprising that many commentators and the Illinois Supreme Court have recommended the pure system.[32]

If the Illinois Supreme Court and critics of the new system are correct, the Act's change in the negligence standard will not effect a change in the perceived crisis. While the modified approach appears to be a more just approach to compensation, the reality is that many substantially negligent defendants will avoid liability for their acts. Thus, the change may neither promote justice nor solve the perceived insurance crisis.

B. Changes in the Doctrine of Joint and Several Liability

The Tort Reform Act also alters the doctrine of joint and several

---

law's shift in focus from concepts of deterrence and compensation to those of societal insurance and risk spreading. The investigators criticized this trend and its promotion of no-fault liability. *Id.* at 30-33.

28. Five years after the *Alvis* court decided that the modified comparative negligence system would not reduce the insurance costs, the Tort Policy Working Group reached the same conclusion. *Id.* at 22-25, 31 n.24. The Working Group found that the insurance industry was attempting to match premiums to risk, an approach that had not been undertaken since the boom years of the late 1970's and early 1980's. *Id.* During that period, interest rates allowed insurance companies to engage in price wars. *Id.* at 22-25. Subsequently, insurance prices have stabilized. Nevertheless, once the companies' profitability is restored, the price of insurance probably will remain high. Therefore, the Working Group did not predict its suggested reforms would solve the problem of insurance affordability or availability. *Id.* at 22-28. *See also Alvis*, 85 Ill. 2d at 26, 421 N.E.2d at 897.

29. McKinnon, *The Case Against Comparative Negligence*, 28 CAL. ST. B.J. 23 (1953).

30. V. SCHWARTZ, *supra* note 11, § 21.3 (citing Rosenberg, *supra* note 17).

31. V. SCHWARTZ, *supra* note 11, § 21.3.

32. *Alvis*, 85 Ill. 2d at 26, 421 N.E.2d at 897; V. SCHWARTZ, *supra* note 11, § 21.3.

liability.[33] Illinois is now in the minority of states that have modified or abolished joint and several liability.[34] The new section states that any defendant whose fault is less than 25% of the plaintiff's fault is severally liable for the claimed damages.[35] If a defendant's fault is more than 25% of the fault attributable to the plaintiff, that defendant is jointly and severally liable for the claimed damages.[36] All of the defendants found liable are jointly and severally liable for any past and future medical and medically related expenses incurred by the plaintiff.[37] Also, defendants found liable for injuries involving the discharge of chemicals or pollutants into the environment will remain jointly and severally liable, while those who attempt to remedy the situation or handle the waste are only subject to the 25% rule.[38]

The former joint and several liability doctrine had been the subject of criticism in the wake of the perceived insurance crisis. Even those who previously had not favored tort reform argued that the doctrine had to be changed. In 1984 and 1987, the American Bar Association formed special committees to analyze the tort liability system. The 1984 committee published a report, entitled the Bell Committee Report, that found the system adequate for resolving disputes between tortfeasors and their victims.[39] The Bell Commit-

33. The modified system was adopted in part as a compromise to the business community's initial attempt to abolish the pure system. CONFERENCE COMMITTEE REPORT, *supra* note 17, at line 117 (statement of Sen. Rock); line 229 (statement of Sen. Schuneman).

34. *See* N.Y. Times, July 14, 1986, at A1, col. 1. The following states have modified joint and several liability: Indiana (IND. CODE § 5B-287 (1985)); Iowa (1984 Iowa Acts 668.1, 619.17); Louisiana (LA. CIV. CODE ANN. art. 2324 (West 1982)); Minnesota (MINN. STAT. ANN. § 604.01(1) (West 1986)); Nevada (NEV. REV. STAT. § 41.141(3) (1975)); Oklahoma (Lambach v. Morgan, 588 P.2d 1071 (1978); Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (1980)); Oregon (OR. REV. STAT. § 18.485 (1983)); Pennsylvania (42 PA. CONS. STAT. ANN. §§ 7102(b), 8322-8354 (Supp. 1986)); Texas (TEX. REV. CIV. STAT. ANN. art. 2212(a) (Vernon Supp. 1985)); Washington (WASH. REV. CODE ANN. § 4-22.070 (1986)); West Virginia (W. VA. CODE §§ 55-7B-8 to -9 (1986)).

The following states have abolished joint and several liability: Kansas (Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978)); New Hampshire (N.H. REV. STAT. ANN. § 507:7.a (1983)); New Mexico (Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (1982)); Ohio (OHIO REV. CODE ANN. § 2315.19(A)(2) (1986)); and Vermont (VT. STAT. ANN. tit. 12, § 1036 (Supp. 1986)). Also, Connecticut, Utah, and Wyoming abolished joint and several liability in the last few months. Granelli, *The Attack on Joint and Several Liability*, 21 A.B.A. J. 61, 62 (1985).

35. ILL. REV. STAT. ch. 110, para. 2-1117 (1986).

36. *Id.*

37. *Id.*

38. *Id.*

39. *See* American Bar Association Special Committee Report, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American*

tee Report, however, criticized the doctrine of joint and several liability and suggested reforms in this area.[40] The 1987 committee, the Action Commission, also suggested modifications of the joint and several liability doctrine.[41] Most critics of the doctrine argue that a defendant should pay only for his portion of fault for an injury because "[o]ne injustice shouldn't provoke another injustice."[42] The effect of the rule has been to encourage plaintiffs to sue defendants who are "only minimally at fault, but who happen to have deep pockets."[43] Therefore, to remedy harsh results,[44] critics have argued that the doctrine of joint and several liability should be eliminated.[45] Nevertheless, the Act's modifications are a compromise at best[46] and have been criticized as ineffectual.[47]

Interpretational problems also may arise from the Act's ambiguous language. The section that altered the damage formula is subject to two different interpretations. The section states that, once a defendant's fault is found to be less than 25% of the plaintiff's, "the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages."[48] If the language is interpreted to mean that only those third parties the plaintiff could have sued are considered in the damages formula, then any defendants who may have immunity or are insulated from suit by the plaintiff will not be considered in the damages allocation and each party's percentage of fault may be higher. On the other hand, this section also could

---

Tort Law 11-44 (1984) [hereinafter A.B.A. REPORT]. The Committee stated that the present system of jurisprudence "offers professionally refined answers, developed over time, to concrete disputes." *Id.*

40. *Id.* at 13-17.

41. *See generally* AMERICAN BAR ASSOCIATION REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM (1987) [hereinafter ACTION COMMISSION REPORT].

42. Granelli, *supra* note 34, at 63.

43. Birnbaum, *Tort Proposals Analyzed*, NAT'L L.J., June 23, 1986 (Special Litigation Section), at 18.

44. *See* Granelli, *supra* note 34, at 61. Mr.Granelli began his article with examples of extreme cases in which the doctrine of joint and several liability has led to inequitable results. He cited, for example, a case in Los Angeles in which a driver high on drugs went through a stop sign and was broadsided by another motorist. The jury returned a verdict of $2.16 million against the driver and the City of Los Angeles, which had failed to trim the bushes that partly obstructed the view of the driver. *Id.*

45. *Id.* The Tort Policy Working Group also has suggested eliminating the doctrine unless the plaintiff can prove concerted action on the part of the defendants. POLICY REPORT, *supra* note 27, at 64-65.

46. *See supra* note 33 and accompanying text.

47. *See* CONFERENCE COMMITTEE REPORT, *supra* note 17, at line 236 (statements of Sen. Schuneman).

48. ILL. REV. STAT. ch. 110, para. 2-1117 (1986).

be interpreted to mean that non-party defendants who could have been joined by the plaintiff, but who are not sued, also are considered in the damages formula. In the latter case, each party's recovery is reduced in proportion to the non-party's percentage.

C. Changes in the Collateral Source Rule

The collateral source rule has been settled law in most states since the early part of the century.[49] One of the earliest Illinois cases involving application of the rule was *Pittsburgh, Cincinnati & St. Louis Railway Company v. Thompson*.[50] In *Thompson*, the plaintiff passenger was injured on a train operated by the defendant. The plaintiff was awarded $5,000. The defendant appealed, claiming that the trial court's refusal to instruct the jury to deduct from the damages any sum paid to the plaintiff by his insurance company was reversible error.[51] The appellate court disagreed, stating that "[i]f such sum was paid, it was not *pro tanto* a discharge of the railway company."[52]

The Illinois appellate court in *Thompson* properly addressed the dual aims of the tort system, deterrence and compensation, when it refused to allow the defendant to benefit from the plaintiff's insurance coverage. The collateral source rule, however, has been criticized as the wrong doctrine to fulfill these aims.[53] Critics of the doctrine argue that the rule treats identically the intentional wrongdoer, the negligent tortfeasor, and the strictly liable tortfeasor. Further, the burden of the damage award often is not placed on the wrongdoer, but on insurers and the public.[54] Even the fairness of applying the collateral source doctrine in situations when the plaintiff has paid for his or her own insurance has been questioned. Critics argue that while an insured is paying for security, he or she should not receive more than was bargained for.[55]

---

49. *See, e.g.*, Evans v. Chicago, Minn. & St. Paul Ry. Co., 133 Minn. 29, 158 N.W. 335 (1916); Gray v. Boston Elevated Ry. Co., 275 Mass. 143, 102 N.E. 71 (1913); Gatzweiler v. Milwaukee Electric Ry. & Light Co., 136 Wis. 34, 116 N.W. 633 (1908); Cornish v. North Jersey Street Ry. Co., 73 N.J.L. 273, 62 A. 1004 (1906); Louisville & N. Ry. Co. v. Carothers, 23 Ky. L. Rptr. 1476, 65 S.W. 833 (Ky. 1901). The rule itself came into being in 1854 in The Propellor Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854).

50. 56 Ill. 138 (1878).

51. *Id.* at 143.

52. *Id.*

53. *See* Fleming, *The Collateral Source Rule and Contract Damages*, 71 CALIF. L. REV. 56, 58 (1983); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 753 (1964) [hereinafter Note, *Unreason in Damages*].

54. *See* Note, *Unreason in Damages*, *supra* note 53, at 749.

55. *Id.* at 751.

The Bell Committee and Action Commission reports, however, found that the rule insures that the defendant pay the full compensation due the plaintiff and not benefit from the plaintiff's insurance.[56] The Bell Committee found that traditional compensatory damages provide insufficient compensation to plaintiffs because they don't take into account the inconvenience of litigation, unanticipated inflation, and the inroads into damage awards of legal fees.[57] It also noted that the rule is just and enhances deterrence by forcing the defendant to pay fully for his or her negligence.[58]

The new Act also alters the collateral source rule. The new section states that any medical, hospital, or nursing charges over $25,000 paid by an insurance company or fund will be deducted from a recovery.[59] The deduction does not apply to the right of reimbursement through subrogation, indemnity, or operation of law and cannot reduce the verdict by more than 50% of the total.[60] To take advantage of this section, the defendant must apply within thirty days to reduce the judgment.[61]

Critics believe that the new collateral source rule will affect only "five percent of all the cases in Illinois, and do absolutely nothing for the great bulk of lawsuits that are filed in Illinois."[62] While this statement may not prove accurate, double recovery is avoided by the modification of the rule.[63] The new section allows a plaintiff to recover the amount he or she paid for the collateral source, while

56. A.B.A. REPORT, *supra* note 39, at 5-203 (citing Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 10, 465 P.2d 61, 66, 84 Cal. Rptr.173, 178-79 (1970)); ACTION COMMISSION REPORT, *supra* note 41, at 22. Conversely, the Tort Policy Working Group recommended the elimination of the collateral source rule. The Working Group found that the rule made sense when collateral sources were financed by the plaintiff, but found that the majority of collateral sources presently are financed by employers or governments. Under these circumstances, the Working Group asserted that the plaintiff received a windfall recovery. POLICY REPORT, *supra* note 27, at 70-71.

57. A.B.A. REPORT, *supra* note 39, at 5-203 (citing Note, *Unreason in Damages*, *supra* note 53, at 750).

58. A.B.A. REPORT, *supra* note 39, at 5-206.

59. ILL. REV. STAT. ch. 110, para. 2-1205.1 (Supp. 1986).

60. *Id.*

61. *Id.* at para. 2-1205.1(1).

62. CONFERENCE COMMITTEE REPORT, *supra* note 17, at lines 240-41 (statements of Sen. Schuneman).

63. Birnbaum, *supra* note 43, at 2. The author noted:

> Although the collateral source rule was an effective device in implementing the common law of deterrence, the justification for the rule has been questioned under modern tort theory. By definition, a plaintiff involving the application of the rule has already been partially or fully compensated; application of the rule therefore amounts to double recovery.

Id.

avoiding double recovery problems by reducing the recovery by the amount provided by other entities.

D. Changes in the Availability of Punitive Damages

Perhaps the most significant aspect of the Act is its limitations on punitive damages.[64] Punitive damages can no longer be mentioned in a complaint, but must be requested in a pretrial motion before the court.[65] The motion must be made within thirty days after the close of discovery. Also, if a punitive damage motion is granted, the claim will not be affected by an applicable statute of limitations if the original complaint was timely filed.[66] The new procedural requirements force a plaintiff to prove that a claim for punitive damages is justified before it can be added to a complaint.

A second punitive damages section in the Act states that a judge may decide that an award for punitive damages is too high, enter a remittitur, and order a conditional new trial. Additionally, the award may be broken down into many different forms. The judge can divide the award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Rehabilitation. The portion awarded to the plaintiff's attorney may be given without regard to any fee contract. The only requirement is that the award may not exceed the contingent contract and should take into consideration any special duty that was owed by the defendant to the plaintiff.[67]

The punitive damage sections did not alter punitive damage awards to the same extent as have some other state reform acts or to the extent recommended in a federal act backed by Orrin G. Hatch.[68] The section is also not as restrictive as the Illinois Medical Malpractice Act's total ban on punitive damages.[69] While advocates of reform claim that increases in punitive damages and

64. ILL. REV. STAT. ch. 110, para. 2-604.1 (Supp. 1986).

65. *Id.*

66. *Id.*

67. ILL. REV. STAT. ch. 110, paras. 2-604.1, 2-1207 (Supp. 1986).

68. S. 1804, 99th Cong., 2d Sess. (1986) (proposed by Sen. Orrin G. Hatch, R-Utah). The federal legislation would place a cap on pain and suffering damages. *Id.*

Missouri has capped non-economic losses, including punitive damages at $350,000. Similarly, Kansas ($250,000 limit on non-economic damages), Maryland ($350,000 limit on non-economic damages), Minnesota ($400,000 limit on "intangible" damages), South Dakota ($1,000,000 limit on damages), Washington ($117,000 to $570,000 limit on damages), and West Virginia ($1,000,000 limit on non-economic damages) have enacted damage caps. Moskowitz, *From Coast to Coast, The Push is on to Limit Liability*, BUS. WK., April 28, 1986, at 28.

69. ILL. REV. STAT. ch. 110, para. 2-1115 (Supp. 1986).

non-economic loss damages have helped fuel the insurance crisis,[70] others claim that the increase in these damages is illusory.[71] Though the new system will add another hurdle for the plaintiff prior to claiming punitive damages, it will not restrict this right in deserving cases. Whether a claim for punitive damages will be appended automatically to each new complaint remains to be seen. Regardless, it is expected that this extra process will add to the time and money spent on some cases.

E. Additional Sanctions For Frivolous Pleading

The Act also adds a section that parallels Federal Rule 11 sanctions for frivolous pleading.[72] In addition to the Rule 11 language, section 2-611 adds a clause providing for sanctions against insurance companies that knowingly allow lawyers to sign pleadings that are frivolous. The portions of the old section 2-611 concerning untrue statements are stricken. The new section states that the attorney signing a pleading certifies that the information in it is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[73]

The new sanctions section duplicates the wording of Federal Rule 11 and forces lawyers to verify their pleadings prior to signing them. Illinois courts likely will use the existing federal law as a guideline in construing the new section. The standard applicable to Federal Rule 11 requires that an attorney certify a pleading or paper after a "reasonable inquiry" is made that the paper is well grounded in fact and is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[74] Further, the document must not be filed for any improper purpose.[75]

---

70. POLICY REPORT, *supra* note 27, at 35.

71. Kovach, *supra* note 2, at 21. Mr. Kovach stated that "the statistic which places the average product-liability award in 1985 at more than $1.8 million does not include subsequent award reductions, decision reversals, or defense victories. It's like measuring an elephant and claiming to know the average size of all the animals on earth." *Id.*

Mr. Kovack's criticism is borne out by a preliminary study of punitive damage awards in Cook and San Francisco counties. San Francisco's awards remained stable throughout the 1980's. In contrast, awards in Cook County doubled between 1980 and 1984. Post-trial action reduced awards in both counties by an average of 50%. Peterson, *Punitive Damages: Preliminary Empirical Findings*, ARAND NOTE 20-22, 44 (1985).

72. FED. R. CIV. P. 11.

73. ILL. REV. STAT. ch. 110, para. 2-611 (1986).

74. FED. R. CIV. P. 11.

75. *Id.*

Rule 11 imposes an affirmative duty to conduct a prefiling investigation into the facts and law applicable to a document prior to its filing.[76] A court must impose sanctions once a violation of the certification requirement is discovered.[77]

The standard for review of a document is one of reasonableness under the circumstances, and is "more stringent than a good faith formula."[78] The court will consider the totality of the circumstances surrounding the preparation of the document, including the time allowed for investigation, the facts underlying the assertions, and the law cited in the document.[79] The test is objective and a lawyer may not claim an "empty head, pure heart" defense.[80]

The new Act added a sanctions section to address the problem of an overly litigious society.[81] The effectiveness of this section in curbing frivolous suits is open to question,[82] although there are indications that courts are beginning to take these motions seri-

76. FED. R. CIV. P. 11 advisory commitee's note.

77. FED. R. CIV. P. 11. Rule 11 provides: "If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction." *Id.*

78. FED. R. CIV. P. 11 advisory committee's note.

79. *Id.*

80. *Id. See, e.g., Frazier v. Cast*, 771 F.2d 259, 263 (2nd Cir. 1985); *Pudlo v. Director, Internal Revenue Service*, 587 F. Supp. 1010, 1011 (N.D. Ill. 1984); Schwarzer, *Sanctions Under The New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181, 187 (1985).

81. CONFERENCE COMMITTEE REPORT, *supra* note 17, at lines 283-87 (statements of Sen.Rock).

82. *Amended Rule 11 of the Federal Rules of Civil Procedure: How go the Best Laid Plans?*, 54 FORDHAM L. REV. 1 (1985). The effectiveness of Rule 11 was discussed by judges, magistrates, and practitioners at a symposium of the Association of the Bar of the City of New York. *Id.* at 1. The participants noted that despite circumstances which appeared ripe for a Rule 11 motion, none was made. Canon, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 10, 11 (1985). The lack of time, money, and economic rewards were cited as reasons for lawyers' reluctance to move for sanctions. *Id.* at 12. One study found that there were only 132 reported cases of sanction requests over a two year period. Of these 132 cases, there were only 52 grants of sanctions. While the study does not account for the cases that might have been filed but were not because of fear of sanctions, it illustrates that the imposition of sanctions is so rare that much of an attorney's respect for the Rule may be diminished. Chrein, *The Actual Operation of Amended Rule 11*, 54 FORDHAM L. REV. 13, 16 (1985).

Judicial reluctance to impose sanctions is apparent from a recent opinion by Judge Getzendanner in the Northern District of Illinois. In Jirus v. City of Berwyn, No.86-8219 (N.D. Ill. 1987), the plaintiff, a fireman, sued the City of Berwyn because he was retired mandatorily without the required Bona Fide Occupational Qualification study. The City admitted liability, but claimed that the plaintiff was entitled only to liquidated damages until December 31, 1986 under an amendment to the Age Discrimination in Employment Act. *Id.* at 1.

At a pretrial conference, Judge Getzendanner warned the parties that the court had a similar case before it in which both parties agreed that the ADEA amendment did not

ously.[83] An aggressive application of new section 2-611 will be necessary if this section is to curb frivolous lawsuits.

CONCLUSION

The Tort Reform Act attempts to address a perceived insurance crisis. The new Act changes the former system of comparative negligence, the doctrine of joint and several liability, and the collateral source rule. Further, it limits punitive damages, and adds sanctions for frivolous pleadings. Despite the number of alterations, the Tort Reform Act does not radically change tort law. Moreover, the Act does not regulate the insurance industry and probably will not solve insurance availability or affordability problems.

---

apply to case filed prior to January 1, 1987. The court requested the parties to file memoranda in support of their arguments. *Id.* at 2.

The parties filed their memoranda, but did not mention the applicable portion of the amendment. Judge Getzendanner stated:

> The court is frankly astonished that the parties missed the critical section of the statute, particularly in light of the information the court gave the parties . . . that the EEOC and the Sheriff's Office appeared to agree that the amendments were not material to the question of remedy. The defendant's memorandum ordinarily would result in a Rule 11 sanction because it argues a totally insupportable legal position. However, the plaintiff's memorandum was almost incomprehensible, and the court therefore will not entertain a motion for sanctions.

Id. at 3.

83. *See* Nelken, *Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in The Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987). In fact, Professor Nelken voiced a concern that Rule 11 may chill aggressive advocacy of new and unusual legal claims. *Nelken, supra*, at 1351.