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Illinois State Senate

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Illinois' Landmark Tort Reform: The Sponsor's Policy Explanation

*Kirk W. Dillard**

The determination of what is for public good and what are public purposes are questions to be decided in the first instance by the General Assembly. In so doing that body is vested with a large discretion which the courts cannot control except where its action is evasive of or contrary to some prohibition of the constitution.¹

States are not required to convince courts of the correctness of their legislative judgments.²

I. INTRODUCTION

The Illinois Civil Justice Reform Amendments of 1995 (the "Amendments")³ significantly altered the legal, economic, and social structure of tort law. The often discussed tort reform debate⁴ called

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The views expressed in this article are those of the author and are not intended to reflect the full legislative history of the Illinois Civil Justice Reform Amendments of 1995 or fully encompass the entire rationale behind the author's sponsorship of Illinois' sweeping 1995 tort law changes. A special thank you is due to Saul J. Morse, General Counsel, Illinois State Medical Society, for his thorough preparation of the legislative sponsors of the public policy, history, and content of the Illinois tort issues. Also, thanks goes to Martin H. Redish, Louis and Harriet Ancel Professor, Northwestern School of Law, Dean Victor E. Schwartz, Crowell & Moring, Washington, D.C., and my partners and associates at Lord, Bissell & Brook, Marilee Clausing, Diane I. Jennings, and Edward Gibbons.

1. *People v. Chicago Transit Auth.*, 64 N.E.2d 4, 9 (Ill. 1945).

2. *Minnesota v. Clover Leaf Creamer Co.*, 449 U.S. 456, 464 (1981).

3. The Civil Justice Reform Amendments of 1995, Pub. Act No. 89-7, 1995 Ill. Legis. Serv. 224 (West) (codified in scattered sections of ILL. COMP. STAT. ANN. chs. 430, 730, 735, 740, 745, 815, 820 (West Supp. 1996).

4. See Martha Middleton, *A Changing Landscape As Congress Struggles to Rewrite the Nation's Tort Laws, The States Already May Have Done the Job*, A.B.A. J., Aug. 1995, at 57 ("The new Civil Justice Reform Amendments of 1995 are touted as the most comprehensive changes in tort law adopted by a state legislature."); *F.Y.I. Illinois Sets*

upon us, as legislators, to return fairness, predictability, and responsibility to the Illinois civil justice system.

Most attorneys have faith and belief in the value of our court system and the importance of the right of people to seek redress for their grievances.⁵ Many, however, have become increasingly concerned over the years with the ways in which the system that we hold so dear has been consistently and continually pushed from its foundation.⁶

Many people now believe that they should have the right to sue and receive a reward for any slight, inconvenience, or injury.⁷ Many also believe that their compensation should be unlimited.⁸ In reality, however, Illinois law must place reasonable limits on tort litigation, providing a forum for redress of grievances, but also a measure of responsibility on the process and the result.⁹ The new Illinois tort law

the Pace for Tort Reform, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, Mar. 20, 1995, at 6-8; Michael J. Gallagher et al., *Illinois Tort Reform: The Judges' Perspective*, 84 ILL. B.J. 124, 124-30 (1996); *A New Day: The Civil Justice Reform Amendments of 1995*, CHI. B. REC., May 1995, at 18. See also Richard B. Schmitt, *While Congress Debates, States Limit Civil Lawsuits*, WALL ST. J., June 16, 1995, at B1 ("While Congress was making headlines debating federal legislation to limit civil damage awards, the Illinois legislature was quietly turning words into action.")

5. See, e.g., David A. Decker, *Lock and Load! with Injury Victims the Target*, 83 ILL. B.J. 8 (1995); *When Lighting Struck: Illinois' Civil Justice System After March 9, 1995*, CHI. B. REC., May 1995, at 30.

6. Gordon R. Broom, *President's Message*, IDC Q., 3d Q. 1995, at 2-3. See also James R. Covington III, *More Tort Limits: Car Dealers, Churches, CPA's, Hockey, Horses, Nursing Homes and Skating Rinks*, IDC Q., 3d Q. 1995, at 6 (discussing further liability limits passed by the General Assembly in the aftermath of the Civil Justice Reform Amendments of 1995).

7. In 1991, nearly 19,000,000 new civil suits—including divorce cases, personal injury lawsuits, and other civil actions—were filed in America's state courts. NATIONAL CENTER FOR STATE COURTS' COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991, at 7 (1993) (on file with author). That is one new lawsuit for every ten adults. *Id.* In a survey of 600 Illinois voters, 75% feel that too many people take unfair advantage of the legal system in order to receive large damage awards; 76% feel that too many lawsuits are being filed; 82% feel that too many frivolous lawsuits are being filed; and 30% are concerned about being sued personally in a personal injury suit. *Illinois Tort Reform: A Statewide Survey of Registered Voters*, VOTER/CONSUMER RESEARCH 2-7 (June 24-28, 1994) (conducted for the Illinois Civil Justice League).

8. *Politics Sets Back Reform*, CHI. TRIB., May 8, 1996, § 1, at 24 (editorial).

9. In both the preamble to the Act and the legislative debate, the legislature explained the bases for its tort reform measures, including the cap on non-economic damages, as follows:

- problems in the civil justice system affect the availability of jobs and health care in the State;
- the civil justice system inconsistently compensates injuries;
- since non-economic losses cannot be measured objectively, awards based upon such losses are subjective and erratic, which undermines the credibility and deterrence function of the tort system;

achieves these goals.

When injured people receive different awards for the same injury based solely upon, for example, the county in which the courtroom lies, we have a problem.¹⁰ When business people and professionals view the civil justice system and our courts not as something to be protected and held in esteem, but something to be feared, we have a problem.¹¹ When concepts and rules which we believed would be in place for generations are twisted and changed overnight in courtrooms, we have a problem.¹²

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- the systemic costs of tort liability threaten the State's economic health through higher prices, health care costs, and tax burdens;
 - there has been an "explosion" in the amounts sought and awarded for non-economic damages, which are the least objective element of injury; and
 - elements such as pain and suffering cannot be quantified in a "fair and reasonable" manner.

See Pub. Act No. 89-7, 1995 Ill. Legis. Serv. 224 (West) (codified in scattered sections of ILL. COMP. STAT. ANN. chs. 430, 730, 735, 740, 745, 815, 820 (West Supp. 1996)); ILLINOIS HOUSE OF REPRESENTATIVES TRANSCRIPT, 89TH GEN. ASSEMBLY, REGULAR SESS., Feb. 16, 1995, at 2, 23-24, 26, 56, 82, 116, 147 [hereinafter HOUSE TRANSCRIPT].

10. This perception is corroborated by an experiment performed by one of the "experts" retained by the plaintiffs in a consolidated group of cases in the Circuit Court of Cook County challenging the Civil Justice Reform Amendments of 1995. Neil Vidmar, a vocal and prolific critic of tort reform, asked a sampling of individuals to award damages in a hypothetical case. Without any differences in facts or legal arguments, awards for the "pain and suffering" caused by a broken leg varied from less than \$40,000 to over \$200,000. Neil Vidmar, *Empirical Evidence of the Deep Pocket Hypothesis: Jury Awards For Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 241-252 (1993). Moreover, the reasons the jurors gave for their awards showed that they viewed such damages, not as compensation for pain and suffering, but as a form of punitive damages. *Id.* at 252-55. That is, the amount awarded was a measure of how angry the defendant's conduct made the jurors, not how much the plaintiff suffered.

11. In response to growing unrest among businesses, health care professionals, not-for-profit organizations, farmers, and local government units over lawsuit abuse, the Illinois Civil Justice League was formed. Its members represent more than 30,000 Illinois businesses, several hundred thousand employees, and more than 20,000 professionals in support of tort reform efforts. ILLINOIS CIVIL JUSTICE LEAGUE, ILLINOIS CIVIL JUSTICE LEAGUE MEMBERSHIP PROFILE (1996).

12. It should be noted that the doctrine of joint and several liability and "pain and suffering," were the creation of courts and lawyers, not legislatures.

II. THE AMENDMENTS' REMEDIES

The Amendments¹³ sought to correct some of these problems by re-establishing that fault is the basis for liability in tort litigation. Concepts such as fault and the legal term "privity," meaning a direct relationship between one who is injured and one who causes the injury, were abandoned over the years.¹⁴ Our system reached so far in an effort to compensate those who were injured that it stressed the award of large sums of money to individuals without due consideration to the true magnitude of the harm, the individual or entity which caused the harm,¹⁵ or the impact that an individual award may have had on society

13. House Bill 20, the Civil Justice Reform Amendments of 1995, was approved by Illinois Governor Jim Edgar on March 9, 1995 and became Public Act No. 89-7. Pub. Act No. 89-7, 1995 Ill. Legis. Serv. 224 (West) (codified in scattered sections of ILL. COMP. STAT. ANN. chs. 430, 730, 735, 740, 745, 815, 820 (West Supp. 1996)). It passed the Illinois State Senate with an extraordinary majority bi-partisan vote. Contrary to the legislation's opponents, this author's remarks indicate the act was thoroughly considered:

[W]e have had, physically, this bill in this Body for two weeks. It has been analyzed. It has been turned over. In committee the other day, we had 70 amendments prepared by opponents of this bill. That shows me that there has been a thorough analysis of this bill; plenty of time to look at it. And yesterday's *State Journal Register* here in Springfield characterized our hearing, in which Senator Hawkinson fairly presided, as a marathon five-hour session of the Senate Judiciary Committee. I've only served in this Body a year or so, but I've been around this process a long time. This issue has been around. . . . And I can guarantee you that the opponents of this bill, just like we proponents, have looked, analyzed every comma, and everything in this bill. So there's plenty of ample time for study. I, personally, as the sponsor of this bill, have met with plaintiffs' trial lawyers. I have met with hundreds of people privately, as well as in committee hearings, on this bill, to seek their input.

ILLINOIS SENATE TRANSCRIPT, 89TH GEN. ASSEMBLY, REGULAR SESS., Mar. 3, 1995, at 69, 73-74 (statement of Sen. Dillard) [hereinafter SENATE TRANSCRIPT].

14. See W. Page Keeton, et al., PROSSER AND KEETON ON TORTS, §§ 96-98, at 681-94 (5th ed. 1984) (discussing the demise of the privity requirement in product liability actions); see also *McPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. Ct. App. 1916) ("[W]e have put aside the notion that duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else."). See generally Martin H. Redish, *The Constitutionality of Illinois Tort Reform, III,—The Repeal of Joint and Several Liability*, IDC Q., 2d Q. 1996, at 5 (discussing the constitutionality of the 1995 Illinois tort reform law).

15. See Pub. Act. No. 89-7, § 15, 1995 Legis. Serv. 235 (West) (codified at ILL. COMP. STAT. ANN. ch. 735 § 5/2-1117 (West Supp. 1996)) which abolished joint and several liability in Illinois. In repealing joint and several liability, the General Assembly concluded that defendants should not be obligated to pay for harm which they did not cause.

at large.¹⁶ Thus, the system focused more on redistributing assets than on rational compensation.¹⁷

For this reason, we needed parameters for that least objective element of damages: non-economic damages.¹⁸ By this law, we did not mean that people do not truly suffer pain as a result of their injuries. Rather, we recognized that no one can truly know the cost or value of pain and suffering.¹⁹ Therefore, we concluded that it is wholly appropriate to provide reasonable limits on those non-economic damage awards. Those limits still allow for appropriate compensation, but also add back to our system necessary parameters and an element of fairness.²⁰

16. The lawsuit system imposes, it has been estimated, an added hidden "tax" on every American of \$1200 annually or nearly \$5000 for a family of four. John Lewis & Raquel Becerra, CENTER FOR GOVERNMENTAL STUDIES NORTHERN ILLINOIS UNIVERSITY, A STUDY OF THE UNITED STATES AND ILLINOIS TORT SYSTEM 2 (1995) (footnote omitted). That figure results from a tax burden on local governments, cost of insurance, and the cost of health care. The study shows that the direct cost of the Illinois tort system is more than the State of Illinois spends on education, income support, public protection and justice, natural resources, and recreation combined. Letter from Edward Murnane, President, Illinois Civil Justice League to Senator Kirk Dillard (Feb. 24, 1995) (on file with author).

17. The tort liability system cost United States citizens \$131.6 billion in 1991 or 2.3% of our gross domestic product. TILLINGHAST-TOWERS PERRIN, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE App. 1, 15 (study undertaken by Robert W. Sturgis for Tillinghast-Towers Perrin, an international management consulting firm, 1995). This was nearly four times the 0.6% of GDP paid in 1950 and twice what is paid by any other developed country. *Id.* at 16. A review of itemized medical malpractice award verdicts in Cook County from December 1985 through December 1994 indicated that 76% of all the dollars awarded to plaintiffs were for "pain and suffering" and other non-economic considerations. Letter from Peter F. Gallagher, Jr., Director of Public Relations, Illinois State Medical Society to Senator Kirk Dillard (May 17, 1996) (summarizing a study conducted by the Illinois State Medical Interinsurance Exchange (ISMIE); the ISMIE reviewed each of the medical malpractice award verdicts made in Cook County and disclosed in the *Cook County Jury Verdict Reporter* from December 1985 through December 1994) (on file with author).

18. Section 2-1115.1 limits non-economic damages to \$500,000 per plaintiff adjusted for inflation. ILL COMP STAT. ANN. ch. 735 § 5/2-1115.1 (West Supp. 1996). "Non-economic damages means damages which are intangible, including but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society." *Id.* § 5/2-1115.2(b). Importantly, "economic damages," including past and future medical expenses, lost income or earnings and other property loss, are not impacted by this measure. *Id.* § 5/2-1115.2(a).

19. There are no standards to guide juries in making non-economic awards. The non-economic damage awards are subjective and result in instances where people with the same injuries receive unequal compensation as the awards are made by different judges or juries. *See supra* note 10 and accompanying text.

20. *See People v. Chicago Transit Auth.*, 64 N.E.2d 4, 9 (Ill. 1945) ("The determination of what is for public good and what are public purposes are questions to be decided in the first instance by the General Assembly.") A reasonable limit on non-economic awards could have freed a significant portion of these resources for treatment of illness.

These Amendments provide reasonable limits on punitive damages in order to create rational guidelines which will accurately reflect the purpose and historical background of these awards.²¹ It is appropriate to punish, via punitive damages, when punishment acts to stop aberrant behavior.²² Too often, however, punitive damages served merely to enrich a particular plaintiff and were not really appropriate to the cause of action. The loss of a business license, criminal charges, administrative sanctions, or other measures are often more appropriate punishments than the award of punitive damages over and above compensatory damages.

In addition to placing reasonable limits on punitive damage awards, the Amendments reduce the systemic cost of tort recovery.²³ For example, the new law hastens the expensive discovery process by providing that records which would be available in any event are made

See supra note 17.

21. Like the cap on non-economic damages, the limit of three times economic damages was reached after thorough deliberation to arrive at a rational standard that was punitive. It was chosen because a multiple of actual tangible loss is a reasonable manner to assess punishment. In essence, the punishment is clearly related to the penalized activity. Remember, punitive damages are to punish the conduct of the defendant, not to compensate the plaintiff. ILL. COMP. STAT. ANN. ch. 735 § 5/2-1115.05(a) (West Supp. 1996).

22. The term "evil motive" was added to the Illinois punitive damages statute. However, this is a standard of conduct specifically cited by the Illinois Supreme Court in the case *Loitz vs. Remington Arms*, 563 N.E.2d 397, 402 (Ill. 1990). In *Loitz*, the Illinois Supreme Court reviewed the *Second Restatement of Torts* and quoted from the *Restatement* as follows: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's *evil motive* or his reckless indifference to the rights of others." *Loitz*, 563 N.E.2d at 402 (citing RESTATEMENT (SECOND) OF TORTS, § 908(2) 1979); *see* RESTATEMENT (SECOND) OF TORTS § 908 commts. (1979). Both evil motive and the standard of reckless and outrageous indifference in this section of the Amendments were standards specifically recognized in Illinois case law. Specifically, punitive damages are not to compensate, but to punish. As the Court said in the *Loitz*, quoting from the *Restatement of Torts*:

"Since the purpose of punitive damages is not compensation of the plaintiff, but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime. The conduct must be outrageous, either because the defendant's acts are done with an *evil motive* or because they are done with reckless indifference to the rights of others.

Id. (citation omitted) (emphasis added).

23. *See e.g.*, ILL. COMP. STAT. ANN. ch. 735 § 5/2-622 (West Supp. 1996) (requiring a certificate of merit for health care professionals must now contain the name of the author); *Id.* § 5/2-623 (creating certificate of merit in product liability cases).

In personal injury litigation alone, over \$96 billion is spent or lost each year in America to deliver \$41 billion in compensation to injured parties and their attorneys. PHILIP J. HERMANN, *THE 96 BILLION DOLLAR GAME: YOU ARE LOSING: HOW PERSONAL INJURY LITIGATION HAS BECOME A COSTLY GAME TO YOU* 26 (1993).

available more quickly.²⁴ Furthermore, the new law curtails litigation in which defendants seek contribution from the plaintiff's employer. Employers are now liable for only the amount of workers' compensation paid,²⁵ the appropriate measure of their responsibility under state law.²⁶ These examples illustrate an important goal of the new law—to hold down the incredible costs of civil litigation.

The Amendments also addressed flaws in the past product liability system. To protect the economic health of businesses, the new law places limits on the ways in which product liability litigation may be brought and provides for rational review of that process.²⁷ Certainly, no one wants unsafe products in Illinois. We do not know, however, how many good products have not come to market because of the fear of litigation.²⁸

24. One of the most controversial provision in the Amendments was revised § 2-1003, which provides in relevant part:

Any party who by pleading alleges any claim for bodily injury or disease, including mental health injury or disease, shall be deemed to waive any privilege between the injured person and each health care provider, who has furnished care at any time to the injured person Any party alleging any such claim for bodily or mental health injury or disease shall, upon written request of any other party who has appeared in the action, sign and deliver within 28 days to the requesting party a separate consent

ILL. COMP. STAT. ANN. ch. 735 § 5/2-1003(a) (West Supp. 1996).

The consent form which the plaintiff is directed to provide authorizes each person who has provided health care to the plaintiff to permit inspection of the plaintiff's chart or x-rays and to confer with the requesting party's attorney before giving any testimony in a deposition or trial "and engage in discussion with the attorney on the subjects of the health care provider's observations related to the allegedly injured party's health" *Id.*

25. See ILL. COMP. STAT. ANN. ch. 740 § 100/3.5 (West Supp. 1996); ILL. COMP. STAT. ANN. ch. 820, § 305/5(a), § 310/5(a) (West Supp. 1996).

26. See ILL. COMP. STAT. ANN. ch. 740 § 100/3.5 (West Supp. 1996); ILL. COMP. STAT. ANN. ch. 820 § 305/5(a), § 310/5(a) (West Supp. 1996).

27. American companies have been paying liability insurance premiums 20 to 50 times higher than those paid by foreign firms. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (1991). For example, the general aviation industry manufactured over 18,000 airplanes in 1978, yet only 1500 in 1989, primarily due to product liability costs. W. John Moore, *Trial Lawyers on Trial*, 22 NAT'L J. 2964 (1990). From 1974 to 1985, the average jury award in product liability cases jumped from under \$500,000 to over \$1.8 million. *AMA Declares Product Liability Suits Have Negative Impact*, INS. ANTITRUST & TORT REFORM REP., July 20, 1988, at 16, C-1. According to *U.S. News & World Report*, the United States has 30 times more lawsuits per person than Japan. David Gergen, *America's Legal Mess*, U.S. NEWS & WORLD REP., Aug. 19, 1991, at 72 (editorial). There are 70,000 product liability lawsuits in the United States annually and only 200 in the United Kingdom. *Id.*

28. Product liability and litigation concerns have resulted in laboratories (Illinois is the corporate "home" to some of the world's largest pharmaceutical manufacturers) and companies to stop testing for a cure for AIDS vaccines. See Joe Cohen, *Is Liability Slowing AIDS Vaccines?*, SCIENCE, Apr. 10, 1992, at 168; Lawrence Tancredi & Dorothy Nelkin, *Medical Malpractice and Its Effect on Innovation*, in THE LIABILITY MAZE 251,

Furthermore, the Amendments will assist local governments. We do not know how many units of local government have curtailed activities, limited access to their facilities, or acted in other self-protective ways solely because of the fear of being sued.²⁹

Overall, the Amendments appropriately reduced the frequency and severity of civil claims by modifying the former tort litigation system.³⁰ They struck a much needed balance between permitting the redress of all grievances and maintaining a workable, efficient, fair system.

259 (Peter W. Huber & Robert E. Litan eds., 1991) (noting that in the early 1970s there were 13 American based pharmaceutical companies conducting research in fertility and contraception; by 1988—only one).

The old tort reform laws were most harmful to women's health concerns. The old tort laws, for example, added the "lawsuit tax" cost of \$500 to a maternity stay and caused Illinois based Abbott Laboratories to withdraw from clinical trials a new product that could have prevented HIV from being passed from mothers to unborn children. Moreover, it was a system that caused Bendectin, the only prescription drug ever approved in the United States for morning sickness, to be withdrawn from the market. *See Impact of Product Liability on the Development of New Medical Technologies*, AMERICAN MEDICAL ASS'N REPORT OF THE BOARD OF TRUSTEES 88 (1988) (American Medical Association, Proceedings of the House of Delegates, 137th Annual Meeting). *See also Tort Reform: The Time is Now*, ILLINOIS HOSPITAL & HEALTH SYSTEMS ASSOCIATION, CENTER FOR HEALTH AFFAIRS, Mar. 2, 1995 (advocating passage of the Amendments). *See also infra* note 41 (detailing the impact of lawsuits on health care) [hereinafter *The Time is Now*].

29. Hanover Park Mayor Sonya Crenshaw testified before the Illinois Senate Judiciary Committee that one tort judgment amounted to 56% of the Village's annual operating budget. *See* Stephanie B. Goldberg, *Tough Times for Victims*, CHI. TRIB. SUNDAY MAG., July 30, 1995, at 14, 17-18 (referring to Mayor Sonya Crenshaw's March 1, 1995 testimony before the Illinois Senate Judiciary Committee). The award must be paid by the self-insured Village by issuing bonds resulting in a tax increase for more than a decade for local residents. *Id.*

In the Hanover Park case, a jury returned a verdict of \$7,500,000 (reduced to \$6,750,000, less 10% for comparative negligence) against the Village after the plaintiff borrowed a friend's motorcycle at a picnic to go pick up cigarettes. *Id.* Mr. Redlin had no motorcycle license and admitted to have been drinking beer. *Id.* Plaintiff was left a paraplegic after his friend's motorcycle collided with a median strip. *Id.*

Similarly, liability costs of municipalities in north and northwest Cook County and southern Lake County increased by 54% between 1992 and 1993—one year. SURVEY, NORTHWEST MUNICIPAL CONFERENCE 3 (1994).

30. *See* Tania Panczyk, *State's tort reform, as intended, is raising question of whether cases are worth litigating*, CHI. DAILY LAW BULL., May 3, 1995, at 1; Jim Merriner & Michael Gillis, *Lawyers Race to Beat Jury Award Limits*, CHI. SUN-TIMES, Mar. 2, 1995, at 14; Pat England, *Plaintiffs rush to file civil suits; Try to beat tort reform bill signing*, STATE JOURNAL REGISTER (Springfield, Ill.), Mar. 8, 1995, at 1.

III. EMOTIONALISM

Often, the debate on tort reform sadly focuses on emotionalism.³¹ Tort reform discussions rightly include those plaintiffs who have been injured. They deserve consideration, respect, support, and compensation for their losses. They do not, however, deserve unlimited compensation regardless of their measure of loss.

The public debate over tort reform has largely ignored the costs of being a defendant.³² Despite the right to contribution, defendants under the former system often bore more than their fair share of the damages. First, the system unfairly forced defendants to pay more than the damages which they caused. Furthermore, even minimally culpable defendants sometimes remained liable for more than their fair share when another defendant with insufficient assets also caused the plaintiff's injury.

The sweeping Illinois and national election results of November, 1994, carried a message, among others, that it is time for people to be responsible for their own actions.³³ Our citizens, as well as analyses

31. See *supra* note 5. Similarly, the House and Senate floor debates included emotional pleas opposing the legislation by several Democratic Party members. See, e.g., HOUSE TRANSCRIPT, *supra* note 9, at 20-21 ("[I]f you're a child and you're on one of these airplanes with your mother [and] that plane goes down[,] . . . there is very little economic loss because the mother is a housewife That is wrong and you should know it. This is about big business, . . . big medicine, [and] . . . big money. . . . [T]he blood is on your hands.") (statement of Rep. Hoffman); SENATE TRANSCRIPT, *supra* note 13, at 9-12 ("[M]y oldest brother happened to have his leg amputated because of some blood clots Have any of you ever been with someone who has had that kind of surgery and what pain they go through after? Not phantom pain. Real, real, real pain, where they wake up in the middle of the night screaming") (Statement of Sen. Carroll).

32. See, e.g., Gary Taylor, *A Discovery by DuPont: Hidden Costs of Winning*, NAT'L L.J., Mar. 27, 1995, at B1 (noting that "the Teflon maker won summary judgment in 47 jaw implant suits—and learned it's too risky to be a supplier," with legal defense costs estimates to be \$40 million). See also *supra* note 23 and accompanying text (discussing the costs of personal injury litigation).

33. See J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 310 (1979) ("Elections are thought to constitute the great sanction for assuring representative behavior, by showing what the voters consider to be their interests by giving them the incentive to pursue those objectives."); H. B. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* 103 (1960) ("[E]verything necessary to [democratic] theory may be put in terms of (a) legislators . . . who are (b) legitimated or authorized to enact public policies, and who are (c) subject or responsible to popular control at free elections.").

The same types of personal responsibility "themes" were enacted by the General Assembly concerning public aid (welfare) in Pub. Act No. 89-6, approved March 6, 1995. Pub. Act No. 89-6, 1995-1 Ill. Adv. Legis. Serv. 481-528 (Michie) (codified in scattered sections of ILL. COMP. STAT. ANN. chs. 5, 20, 35, 305, 410, 705 (West Supp. 1996)). For a detailed analysis of American Political theory based on an electoral mandate or mood see generally Martin H. Redish, *The Constitutionality of Illinois Tort*

of our judicial system, have indicated that people do not believe that our courts hold people responsible for their actions.³⁴ The new Illinois tort law was an effort to return sense to a system gone astray.

IV. WHO WANTED TORT REFORM

The Amendments were enacted for the people of Illinois.³⁵ The law's opponents argued that big business, big medicine, or big insurance were the forces behind tort reform. These opponents overlooked, however, the thousands, indeed millions, of Illinois residents who were represented in the drafting of this legislation.³⁶ These constituents included the millions of people who ride public transportation in Illinois and who face fare increases in part because of the growing cost of litigation and awards.³⁷ They also included mayors, school superintendents, and park district superintendents in every corner of Illinois—and their constituents—who face higher taxes because of the growing cost of liability and litigation.³⁸

Reform—Access to Health Care Records and Providers: Testing the Legislative Response to Petrillo, IDC Q., 4th Q. 1995, at 4. See also *infra* note 47 and accompanying text (noting that the proper recourse for legislative tort changes is the electoral process, not the courts).

34. See *supra* note 7.

35. The Illinois Constitution dictates that the enacting clause of the laws of Illinois shall be: "Be it enacted by the People of the State of Illinois, represented in the General Assembly." ILL. CONST. of 1970 art. IV, § 8(a).

36. See *supra* notes 11 and 13.

37. See, e.g., *Lee v. Chicago Transit Auth.*, 605 N.E.2d 493 (Ill. 1992), *cert. denied*, 508 U.S. 908 (1993). In *Lee*, a Korean immigrant—unable to read English—after attending a party, with a blood alcohol content over three times the legal limit (placing him in the "stupor" classification), disregarded barricades and warning signs stating, "Danger," "Keep Out," and "Electric Current" and was fatally electrocuted apparently while urinating. *Id.* at 497. The estate was awarded \$3 million (reduced by 50% for decedent's own negligence). *Id.* at 496. The award was paid "out of the fare box" revenues by over one million riders. Goldberg, *supra* note 29, at 14.

38. During the House debates, former school superintendent Douglas Hoeft noted:

My question is what is the cost of this litigation explosion? Having come from the educational community and having been a superintendent of schools, I know that district after district in this state is . . . are stopping programs from being implemented, closing gyms. They are so frightened of the problems created by this tort system, this legal system, that they are virtually driving children out of schools. I asked the Elgin public schools to give me a date . . . detail in what they spent last year in terms of the litigation and the attempt to stop the court involvement with this. They spent \$2,701,000 in their litigation funds. [Two million seven hundred thousand dollars], that could have gone to additional teachers, could have gone for additional programs. The cost for the 927 school districts in this state is absolutely immense. As I was coming to this chamber this day, I walked by the football field at Springfield High School, and I looked up and I saw that it is fenced in. When I was a child we could go down to the football field and we could run

The law's supporters also represented the small businesses in Illinois, including the 21,000 small businesses represented by the National Federation of Independent Business and thousands of others. Illinois' small businesses—ranging from mom-and-pop dry cleaning establishments to corner grocery stores to the small machine tool distributors who legislators heard in committee—all face the risk of lawsuits, some without liability insurance because they cannot afford it. The farmers of Illinois—including the 385,000 members of the Illinois Farm Bureau—wanted tort reform. The not-for-profit organizations of Illinois, including day care centers, homeless shelters, foster care providers, recreational activity organizations, and our local YMCAs sought civil justice reform also.³⁹

Furthermore, doctors supported this legislation, as did hospitals and clinics.⁴⁰ They supported it because it enables them to concentrate more heavily on their mission—providing health care and saving lives—rather than worrying about needless and often unwarranted lawsuits.⁴¹

around. We could have a game on it, after school we could go into the gym and have activities, during the weekends we could go into the school. It's all closed up today because of the fact that the school districts are saying that we cannot put up with the fear of the lawsuit. That track is now surrounded by a huge fence stopping people from enjoying it. We are fencing in our schools, we are fencing in our hospitals, we are fencing in our municipalities in this morass of litigation. I think this is needed, this is a Pro-Illinois Bill and I would urge that it be passed.

HOUSE TRANSCRIPT, *supra* note 9, at 50-51.

39. Legislative debate reveals that when discussing the propriety of tort reform litigation, even Illinois Girl Scouts were considered: "The Southern Illinois Girl Scouts must sell 53,000 boxes of cookies each year just to cover their liability insurance costs. . . . That's up from 41,000 boxes just last year. Scout troops throughout the rest of the state have similar liability costs and stories to tell." HOUSE TRANSCRIPT, *supra* note 9, at 58-59.

Similarly, the National President of Little League Baseball, Steve Keener, in Williamsport, Pennsylvania, told of its increased liability costs from \$75 per league annually, to \$795, an increase of 1000% in 5 years. Letter from Edward D. Murnane, President, Illinois Civil Justice League, to Senator Kirk Dillard 3 (Feb. 24, 1995) (on file with author). Mr. Keener also said that the possibility of lawsuits is having a very negative impact on volunteer recruitment. *Id.*

40. *Lawsuit Reform: The Time Has Come*, ILLINOIS STATE MEDICAL SOCIETY, Feb. 1995; *The Time is Now*, *supra* note 28.

41. In Illinois' 27 southernmost counties, 66% of physicians who provided obstetrical care 10 years ago no longer do so, and most have not been replaced. FRED R. ISBERNER, ET AL., RECOMMENDATIONS FOR THE OBSTETRICAL ACCESS CRISIS IN RURAL SOUTHERN ILLINOIS 6 (Southern Illinois University, 1991). Thirteen hospitals in southern Illinois no longer provide obstetrical care, leaving pregnant women to travel long distances for prenatal care and delivery. *Id.* Some women must be airlifted by Department of Transportation helicopter. *Id.*

The reasons for the staggering numbers throughout southern Illinois are numerous.

Manufacturers, who provide most of the non-government jobs in Illinois, supported this legislation because it helps them to do what they're supposed to be doing: creating jobs⁴² and helping our economy grow free from the worry of unwarranted lawsuits. In addition, manufacturers in Illinois who have slowed down their research and development because of the risk of lawsuits supported the law because it helps them move forward with new technology, new health care developments, and new and better communications.⁴³

V. CONCLUSION

Within moments of the enactment of the Illinois Civil Justice Reform Amendments of 1995, the losers of the legislative battle began a massive assault on the statute in the courts.⁴⁴ The law's opponents

Many relate to lawsuits (and) malpractice insurance. Roger Schlueter, *More babies die in Southern Illinois*, BELLEVILLE NEWS-DEMOCRAT, Apr. 21, 1991, at 1A, 9A. Moreover, the first recommendation of the Illinois Rural Health Task Force, which reported to the legislature and Governor in 1990 said: "Illinois should enact a tort reform statute which will establish a cap on non-economic damages in malpractice lawsuits. . . . A cap on noneconomic damages in malpractice lawsuits potentially eliminates a financial disincentive for physicians to practice in rural areas." RURAL HEALTH TASK FORCE, HEALTH CARE IN RURAL ILLINOIS: RECOMMENDATIONS OF THE RURAL HEALTH TASK FORCE 5 (1990).

42. See, e.g., Geoffrey A. Campbell, *Study: Business Booms After Tort Reform Enacted*, A.B.A. J., Jan. 1996, at 28; *Tort Reform—One Year Later*, POSITION PAPER OF THE ILL. DEPT. OF COMMERCE AND COMMUNITY AFFAIRS, Mar. 29, 1996, at 2-5 [hereinafter POSITION PAPER].

43. In March 1996, the Illinois Department of Commerce and Community Affairs reported that:

- Illinois ranked 4th of all states in the number of new manufacturing facilities. In 1993 and 1994, prior to tort reform, Illinois ranked 15th.
- Illinois ranked 7th of all states in the number of manufacturing facilities which expanded. In 1993 and 1994, prior to tort reform, Illinois ranked 22nd.
- From January to March, 1995, prior to tort reform, DCCA's Bureau of Business Development received contacts from 2,078 business prospects. Since the statutory changes were signed into law, the number of prospects have increased by 61 percent (three quarter average of 3,338 contacts).

POSITION PAPER, *supra* note 42, at 2 (citing Tim Venable, *Triple Crown; Ohio Gallops to Third Straight Win in U.S. Business Location Race*, SITE SELECTION, Feb., 1996, at 132).

Similarly, in a 1995 economic development study on behalf of *Industry Week*, corporate leaders rated a "favorable political climate toward business" as one of their top ten criteria when selection in specific area on site for business retention or expansion. *Economic Development Study*, INDUSTRY WEEK, 1995, at 5.

44. "Plaintiff attorneys' first response to the Civil Justice Reform Amendments of 1995 came in a constitutional challenge filed in the Cook County Circuit Court just minutes after Gov. Jim Edgar signed the tort reform bill into law on March 9, 1995. Carol M. Sanders, *Illinois Leaving Its Wake in Swift Current of Tort Law Changes*, CHI. DAILY LAW BULL., Apr. 22, 1995, at 1 (citing *Cowles v. Didrickson*, No. 95 CH 2154 (Cir Ct. Cook County, March 9, 1995)). See also David Bailey, *Taxpayer Lawsuit*

allege that its provisions violate guarantees contained in the United States and Illinois Constitutions.⁴⁵ Most of these attacks, however, are nothing more than an attempt to persuade the courts to "play legislator" by overturning the political process.⁴⁶ The proper recourse for those people who are unhappy with the Illinois General Assembly's legislative tort changes is the electoral process, not the courts.⁴⁷

Challenging Tort Reform Act is Dismissed, CHI. DAILY. LAW BULL., May 17, 1995, at 1 (noting that a taxpayer lawsuit challenge to the Tort Reform Act had been dismissed).

45. Plaintiffs' "kitchen sink" arguments include, inter alia, the \$500,000 cap to non-economic damages, doctor-patient disclosure rules, requirements that a medical malpractice plaintiff divulge the name of the reviewing health professional, certificate of merit requirement in product liability cases, abolition of joint and several liability, amendments to the joint tortfeasor contribution act, jury instruction provisions, elimination of apparent agency in medical cases, mandatory regulatory presumption in product liability matters, mandatory "alternative design" presumption in product liability cases, and amendments to the statute of repose violate the 1970 Illinois Constitution. They also allege that Public Act 89-7 is invalid as a whole. See, e.g., Joint Memorandum in Support of Plaintiffs' Motions for Partial Summary Judgment at 11-138, *Cargill v. Waste Management, Inc.*, No. 95 L 07867 (Cir. Ct. Cook County, Law Division 1995).

46. See *People v. Shephard*, 605 N.E.2d 518, 525 (Ill. 1992) ("Whether a statute is wise or unwise, and whether it is the best means to achieve the desired results, are among the matters for the legislature and not the courts. A difference of opinion is insufficient to bring the classification to a court's attention."); *Bernier v. Burris*, 497 N.E.2d 763, 769 (Ill. 1986) (explaining that a court will not question legislative judgment that is "at least debatable"). See also *Alamo Rent-a-Car, Inc. v. Ryan*, 643 N.E.2d 1345, 1349 (Ill. App. 1st Dist. 1994) (citing the Illinois Supreme Court's opinion in *Cutinello v. Whitley*, 641 N.E.2d 360 (1994), as authority for the proposition that a "legislative decision is not subject to courtroom fact finding").

47. See, e.g., *People v. Chicago Transit Auth.*, 64 N.E.2d 4, 9 (Ill. 1945). In *Chicago Transit Authority*, the court stated:

The determination of what is for public good and what are public purposes are questions to be decided in the first instance by the General Assembly. In so doing that body is vested with a large discretion which the courts cannot control except where its action is evasive of or contrary to some prohibition of the constitution.

See also *Hannifin Corp. v. City of Berwyn*, 115 N.E.2d 315 (Ill. 1953) (noting that the Illinois Supreme Court lacks authority to question legislative policy). See *supra* text accompanying note 33.