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The Battle at Little Big Horn Has Moved to Raleigh - Is This Custer's Last Stand against Tort Reform?

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I. INTRODUCTION

In recent years, legislatures of all fifty states have considered...
proposals for some type of tort reform. This intense scrutiny of the civil justice system was fueled by stories of huge recoveries based on previously unheard of causes of action premised on little or no fault. In addition, stories circulated about cancellation and unavailability of liability insurance coverage for many essential private and public functions, soaring increases in the cost of insurance coverage, and the insurance industry’s cry of imminent economic disaster.

In response to these concerns, some state legislatures have enacted so-called “tort reform” statutes designed to alleviate some of these problems the public is experiencing. Meanwhile, other states, such as North Carolina, have been slower to act, adopting more of a wait and see approach to the problems in order to gain more insight on how they could best solve them. A few of the reasons some states have been skeptical in jumping on the reform bandwagon are their basic distrust of the insurance industry's allegations in light of the industry’s acknowledged cyclical history, evidence that some of the insurance industry’s problems are based on its own mismanagement, lack of clear proof that the reforms will alleviate the problems complained of by the industry and society, and constitutional concerns as to the validity of some of the proposed reform statutes.

This Comment examines some aspects of the civil justice system in this state, highlights a few of the opposing parties' views on the need for tort reform in North Carolina, and examines proposed solutions currently under consideration by the General Assembly. This Comment will attempt to show that civil justice system reform is not needed in North Carolina and that the legislative enactment of such proposals will prevent proper legal redress for injured residents in this state and require those same residents to

4. Id.
5. Id.
7. See sources cited infra notes 43, 40, 34, 124, 146, and 147, respectively, for detailed analysis of these arguments against enactment of tort reform measures.
subsidize the recoveries of injured parties in other states.

II. WHAT IS WRONG WITH THE SYSTEM?

When one asks, "what's wrong with the tort system?," the answer depends on to whom the question is directed. Different opposing groups put the blame on each other, and sorting through the various factions' accusations and finding substantive, reliable information is difficult at best. A complete understanding and analysis of all the alleged problems is well beyond the scope of this paper. However, a summary understanding of the main allegations is essential in deciding what, if anything, is wrong with the system, and what should be done to correct the perceived problems. This section will discuss several of the alleged problems in light of current North Carolina law. The problems discussed are plaintiff-oriented changes in the law, insurance industry business practices, an overlitigious society, and excessive jury verdicts.

A. Plaintiff-Oriented Changes in the Law

An insurance industry mainstay accusation is that the law has become too plaintiff-oriented, making its job of predicting risks and pricing appropriately impossible. It points to the increased expansion of liability based on little or no fault, abolition of restrictive privity requirements, and lessened requirements of causation which enable plaintiffs to recover more easily. Its argument is that these liberalized standards have increased the incentive for plaintiffs to sue and created an unfair tilting of the scales of justice in the plaintiffs' favor.

Most tort liability expansion in recent years has taken place in the area of products liability. Strict liability for defective design, manufacture, and warnings was first applied by the California Supreme Court in the case of Greenman v. Yuba Power Products.

This case became the basis for the premiere products liability statute in the country, the Restatement (Second) section 402A. Section 402A gained rapid popularity and many states adopted it quickly. This statute is based on a policy assumption that injuries resulting from unreasonably dangerous defective products are a cost of doing business to the manufacturer of those products and that, as between the manufacturer and the injured plaintiff, the manufacturer is in a far better position to absorb those costs of injuries sustained from the use of his products. This is due to manufacturer ability to allocate that cost as an expense of doing business and insure against it. The definition of section 402A has lent itself to varying interpretations, especially in defining what is unreasonably dangerous and what constitutes a defect. As a result, some of the interpretations of section 402A have changed the statute from a strict liability statute premised on the finding of a defect to an absolute liability statute requiring only that the plaintiff show injury to recover. These later interpretations have caused many states to voice misgivings about this statute and as a result its adoption rate has slowed considerably.

When the insurance industry complains about relaxed causation requirements as a cause of their problems, it often points to the case of Sindell v. Abbott Laboratories. This California case involved a class action suit brought by a group of women who indirectly received the drug diethylstilbesterol (DES). The drug was supplied to their mothers during pregnancy to prevent miscarriages; however, the drug caused a form of cancer that appeared after lying dormant and undetected in the daughters for ten to twelve years. The trial court dismissed the case because the plaintiffs could not determine which of the drug companies actually supplied the pills to their mothers for consumption. The California Supreme Court reversed the lower court and held that the defendant manufacturers of DES in operation at the time the plaintiff class received its treatment could be liable for damages

13. Restatement (Second) of Torts § 402A comment 1 (1965).
15. Compare Barker, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978), with Restatement (Second) of Torts, supra note 10, at comments g-i.
17. 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980).
18. Id. at 593, 163 Cal. Rptr. at 133, 607 P.2d at 925.
19. Id. at 593-4, 163 Cal. Rptr. at 133, 607 P.2d at 925.
20. Id. at 595-6, 163 Cal. Rptr. at 134, 607 P.2d at 926.
based on each defendant’s market share. Essentially, the court waived any requirement that the plaintiffs prove which, if any, of the defendants were responsible for their injuries. This position, though limited to certain factual situations, represents a drastic liberalization of standard causation principles.

The vast majority of states in this country have adopted still another liberalization of the law, that being some form of comparative negligence. Under a comparative negligence system of recovery, the plaintiff is allowed recovery for his injuries proximately caused by another negligent party even though he was partially negligent himself. His recovery is merely reduced by a percentage amount that represents the degree of the plaintiff’s negligence. This is contrasted against the system of contributory negligence, which totally bars the plaintiff’s recovery when his own negligence even minutely contributes to the injuries he has sustained. The policy consideration behind the comparative negligence system is that a greater level of fairness can be achieved through apportionment of fault than the harsh recovery-barring effect of contributory negligence.

The above-cited examples are modern expansions of tort law recovery and liability. While these new developments have been taking place in other states, North Carolina has remained one of the more conservative jurisdictions in its application of tort law.

For example, instead of adopting a strict liability prototype products liability statute, the General Assembly in 1979 adopted a products liability statute based on negligence principles. The statute adheres firmly to the negligence principles handed down in McPherson v. Buick Motor Co., a landmark products liability case. The statute also provides for ordinary negligence action defenses such as contributory negligence, assumption of risk, and obvious dangers to act as a complete bar to recovery.

21. Id. at 611-2, 163 Cal. Rptr. at 145, 607 P.2d at 937.
22. At the time of this writing roughly ninety percent of the jurisdictions in this country had passed some form of comparative negligence. The only remaining contributory negligence states are Alabama, Maryland, North Carolina, South Carolina, Tennessee, and Virginia.
25. Id.
27. 217 N.Y. 382, 111 N.E. 1050 (1916).
the statute provides a cause of action for a strictly limited class of people under the implied warranty of merchantability of the Uniform Commercial Code as adopted in North Carolina. Subject to very limited situations, such as a claim for breach of express or implied warranty under the Uniform Commercial Code as enacted in North Carolina, which itself may have limited application in this state, a plaintiff cannot recover for personal injuries in North Carolina absent a showing of the defendant's fault. This requirement has inhibited directly the expansion of tort liability experienced in other states.

In addition to the requirement that the plaintiff show fault in order to recover, North Carolina has retained, despite intense pressure in recent years, the doctrine of contributory negligence. This is further evidence of the conservative view this state takes in regard to tort recovery. Moreover, it shows that North Carolina has taken a common sense approach to tort recovery keeping in mind the costs of running businesses, manufacturing products, and providing services to its citizens.

Therefore, one must wonder if North Carolina should adopt the reforms proposed and adopted in other states. An argument could be made that North Carolina law in its current condition is more "reform" by itself than has been accomplished through the implementation of reforms in more plaintiff-oriented jurisdictions. This also relates closely to an argument adamently supported by the North Carolina Academy of Trial Lawyers, the North Carolina Bar Association, and the North Carolina Department of Insurance that the enactment of any tort reforms will have little effect on liability insurance rates and availability in this state and, further, will actually cause the citizens of this state to subsi-

32. Comparative negligence bills were introduced into the North Carolina House of Representatives during the 1987 Session. They were referred to the House Committee on the Judiciary IV where they currently remain.
33. The bulk of the reforms advocated nationwide do not block currently allowed causes of action but instead attempt to limit relief once judgment is rendered. Current North Carolina tort law fails to recognize some of these causes of action such as § 402A. Failure of a jurisdiction to recognize a cause of action creates more of a disincentive to bring suit than a limitation on damages once the plaintiff gets to court.
dize the recoveries of citizens of more plaintiff-oriented states. These groups base their theory on the fact that upon writing a large policy most insurance companies in effect sell off part of that policy on the reinsurance market in order to insulate the original underwriting company from exposure in the event they should have to pay on the policy. The key is that most reinsurers who participate in the reinsurance market are foreign to North Carolina, and the premiums the original underwriter must pay to the reinsurer to take the risk of purchasing part of their policy are set not on North Carolina loss rates but on national loss rates. Hence, there would be little or no reduction in what would be charged to North Carolina residents on a large liability insurance policy after these reforms were passed because the improved insurance conditions in North Carolina would have little or no effect on national reinsurance rates charged by foreign reinsurers.

B. Insurance Industry Business Practices

The insurance industry gives two answers when asked why insurance is so expensive and so scarce. First, it is losing money in general and, second, it is losing money because of the civil justice system. At the same time, opponents of tort reform argue that greed and poor business practices are the cause of the insurance industry problems and that the industry has created a smoke screen crisis to scare state legislatures into bailing it out. In addition, they argue that no reforms should be passed until the insurance industry has come forward in an open manner with clear evidence to substantiate its claim of difficult times. Regardless of what position is taken, it is clear the insurance industry will be the primary beneficiary of the proposed changes. Therefore, its practices must be examined closely before the General Assembly enacts any of the proposed reforms.

34. Hearings, supra note 8 (see generally statements by James C. Fuller, Chair of the North Carolina Academy of Trial Lawyers Victims' Rights Committee, the Report of the North Carolina Bar Association Special Committee on the Tort Liability System, and statements by North Carolina Insurance Commissioner James E. Long).
35. Id.
36. Id.
38. See sources cited supra note 34.
39. Id.
The North Carolina Department of Insurance points to past pricing and risk management errors and bad judgment as the root cause of the insurance industry's current problems.\footnote{Hearings, supra note 8, at 3-4 (statements by North Carolina Insurance Commissioner James E. Long made Oct. 22, 1985).} Beginning in the late 1970s and into the early 1980s, the industry began a practice known as cash flow underwriting.\footnote{Id. at 3.} This practice was a result of high interest rates prevalent during that period of time. The high rates of interest led insurance companies into frenzied competition, which made companies willing to underprice their policies so they could get access to premium dollars to invest at high rates of return. The high investment income subsidized the under-priced premiums and any claims filed. The attractiveness of the market brought newcomers into the insurance field, which further intensified competition and drove prices down even further.

In the mid-1980s, the interest rates began to fall substantially; as a result, the insurance industry was left without the anticipated interest and investment income to subsidize the losses occurring in certain markets. This resulted in many reinsurers getting out of those markets entirely, substantially hindering the ability of the industry to write certain coverage. This loss of the ability to write these policies is the root cause of insurance shortages.\footnote{Id. at 4.}

In analyzing the property-casualty insurance industry, one must take into consideration that the industry is extremely cyclical in nature.\footnote{Burrow and Collins, Insurance Crisis — Texas Style: The Case for Insurance Reform, 18 St. Mary's L.J. 759, 761 (1987).} This most recent cycle has been deeper and more severe than any other in history.\footnote{Id.} As insurance executives observed the cycle declining in 1984, they saw an opportunity to blame the rate increases needed to offset the lack of investment income on runaway juries, a litigation explosion, and a civil justice system that they claimed was no longer functional.\footnote{Id.} As a result, the insurance industry began advertising campaigns based on this assumption. These campaigns, unlike others in the past, were successful due to their timing coinciding with the raising of rates and shrinking coverage.

In analyzing the industry's economic performance, one should understand that the industry plays with a stacked deck of cards.

For example, under the McCarron-Ferguson Act, the insurance industry is exempt from anti-trust laws. This is based on the idea that the states would regulate through the rate-making process. This has not always happened and leaves insurance companies free to allocate markets among themselves, choosing to write in some states and not write in others, thereby eliminating competition.

Another advantage is the industry's use of "underwriting losses." This term relates to the number of dollars the industry predicts will be paid out in future claims. However, the key is that, when the insurance industry determines underwriting losses, it never accounts for the income made from the investment of premium money. Like banks and other financial institutions, the insurance industry deals in money. It brings it in as premiums and pays it out as losses, which gives the industry a tremendous amount of money to invest. But none of this investment income is considered in the rate-making process. Also, the money set aside as losses in the reserve fund earns substantial interest which is exempt from federal taxation. In other words, loss in insurance terms does not coincide with the traditional meaning of the term.

By increasing or inflating predicted claims, the industry can further itself two ways. First, it pays less taxes as this predicted underwriting loss is offset against current income. Second, it can use its predicted losses to justify premium increases.

In the years leading up to the so-called crisis, insurance profits have been extremely high. In 1980, the industry's profits were $7.73 billion; in 1981, the profits were $6.96 billion; in 1982, the profits were $4.62 billion; and in 1983, the profits were $2.65 billion. In 1984, the industry claimed a loss of $3.82 billion. However, A.M. Best Company's Aggregates and Averages for 1733 property/casualty companies showed that when actual losses paid and underwriting expenses were deducted from premiums written plus net income and tax credits, the overall profit was $8.6

47. Hearings, supra note 8, at 1 (statements by representatives of the North Carolina Academy of Trial Lawyers).
48. Id.
49. Id.
50. Id.
51. Hearings, supra note 8, at 14 (statement made by James C. Fuller, Jr., Chair of the Academy's Victims' Rights Committee).
52. Id.
billion.\textsuperscript{53} Even if one takes the insurance industry's figures at face value, it had an overall profit of $18 billion for the five-year period from 1980 through 1984. That performance is not bad considering the type of management policies, such as cash flow underwriting, which were in place at the time. Furthermore, it is significant that the industry's surplus, essentially its net worth, increased from $52.2 billion in 1982 to $76 billion at the end of 1985.\textsuperscript{54} This was the same time the industry was supposedly in such dire economic straits. Also, these figures for surplus do not include the money set aside as underwriting losses, earning tax free income.

Finally, if anybody should know and understand the insurance industry's economic status, it is Wall Street. In 1985 alone, property and casualty insurance stocks rose by almost fifty percent, twice the general market rise.\textsuperscript{55} Additionally, from 1980 to 1985, the property and casualty industry's stocks increased one hundred ninety-four percent versus an eighty-four percent Dow Jones Index increase.\textsuperscript{56} These are not the signs of an industry on the brink of economic disaster.

Before the General Assembly adopts any of the reform measures, regulators should inspect insurance practices and business methods to be sure that any so-called crisis is indeed a real one, and not some mirage set up by an insurance industry to make up for lost profits due to poor business practices. Specifically, regulators should increase the pressure to require the industry to produce figures reflecting their North Carolina loss experience. Otherwise, North Carolina residents have no assurance that the reforms will cure the current problems.

C. Society Has Become Overlitigious

One of the problems most often cited by tort reform proponents is that society has become overlitigious.\textsuperscript{57} While it may be true that more lawsuits are being filed nationally, many of these lawsuits are non-tortious. When one looks at this state's figures, it becomes clear that there is no merit to the claim that North Caro-

\textsuperscript{53} Hearings, supra note 8, at 3 (statement made by James Maxwell, President-Elect of the North Carolina Academy of Trial Lawyers).
\textsuperscript{54} See sources cited supra note 51.
\textsuperscript{55} See sources cited supra note 37, at 5.
\textsuperscript{56} Id.
\textsuperscript{57} See Report, supra note 3, at 28-30.
N.C. TORT REFORM

lina is caught up in a lawsuit frenzy.\textsuperscript{58} In North Carolina, there has been virtually no increase in litigation per capita from 1975 through 1985.\textsuperscript{59} On the contrary, since 1982 the litigation rate has actually decreased.\textsuperscript{60} Admittedly, plaintiffs have filed more lawsuits, but this increase is in almost direct correlation to the increase in population North Carolina has enjoyed in recent years.\textsuperscript{61}

This increase in population sets off a chain of events that actually aids the insurance industry. A larger population base results in an increase in the number of people who need insurance. This in turn creates a larger customer base, more premiums, more money to invest, more investment income, and a greater capacity to pay claims. The result is that the insurance industry enjoys the benefits of population growth the same as any other customer-oriented business. So while plaintiffs may be filing more lawsuits, the evidence in North Carolina shows that there is no glut of litigation in terms of per capita lawsuits.

D. Excessive Jury Verdicts

As noted earlier, the North Carolina law is very conservative as it relates to the recovery for personal injuries.\textsuperscript{62} The laws are conservative because they are created and administered by legislators and judges elected by the citizens of this state who mirror the ideas and values of those who elect them. These same citizens who elect state officials are the people who, when asked to do their civic duty, act as jurors in the courts of this state. North Carolina juries are noted as being conservative but fair, recognizing true injury but also being quick to spot a nonmeritorious claim. In a sense, proponents of tort reform are telling the North Carolina legislators that those citizens who elect them to carry out and implement their conservative ideas are not fit to act as triers of fact who measure the damages inflicted upon their fellow citizens.

Reform proponents' complaints of runaway juries and excessive verdicts are the center of the reform movement.\textsuperscript{63} As part of

\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item See supra notes 26-31 and accompanying text.
\item See Hearings, supra note 8, at 8.
\end{enumerate}
an effort to raise money and inflame the public, the American Tort Reform Association (ATRA) recently sent out a letter to the public.\(^{64}\) In it the Association cited what it believed to be evidence of its claim that juries must be limited in the amounts they can award.\(^{65}\) However, the Association failed to tell all the facts exactly as they happened, conveniently omitting important aspects of the cases. Below is a summary of the cases the ATRA cited in their letter.

1. **ATRA Version** — A Pennsylvania woman was awarded one million dollars in damages after claiming a CAT scan destroyed her psychic powers.

   **True Facts** — The woman was a spiritual advisor by trade and her claim was actually based on an allergic reaction to a pre-scan injection. The jury verdict was based on pain and suffering (economic damages had been withdrawn earlier by the judge). The judge set aside the verdict because it was excessive and because the jury failed to follow his instructions. The case will be retried.\(^{66}\)

2. **ATRA Version** — A burglar fell through a skylight during a robbery. He was awarded $206,000 and $1,500 a month for the rest of his life.

   **True Facts** — There was no jury award because the case was settled. The plaintiff was a teenager who climbed on the roof of the school to take a floodlight. The skylight was painted over and the fall rendered him a quadraplegic. A student at another school had died in a similar accident at another school eight months earlier and school officials had already contracted to board over the skylights to solve the maintenance and safety problem.\(^{67}\)

3. **ATRA Version** — In California, a drunk driver lost control of his car and crashed into a telephone booth, injuring a man in the booth. The man sued the phone company and others and the California Supreme Court said they were all liable.


\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Id.
True Facts — The unanimous court merely ruled that the plaintiff was entitled to a jury decision on the issue of liability and remanded the case for trial. The liability of the phone company was based on the fact that the plaintiff saw the car coming but could not get out of the phone booth due to a door malfunction or improper maintenance, which caused him to stand idly by waiting to be struck. The case was settled before trial.68

4. ATRA Version — In New York, a man had both his legs severed while trying to commit suicide by throwing himself in front of a subway train. He sued and was awarded $850,000.

True Facts — There was no jury award, because in reality the case was settled. The plaintiff was mentally ill and his lawyers alleged the motorman had ample time to stop. A knowledgeable source stated the case was settled before trial in order to avoid release of derogatory information about the motorman.69

These cases are examples of what often happens. Facts are twisted and stories grow bigger than life. North Carolina, as of 1986, had awarded verdicts in excess of one million dollars only fourteen times in its history — all a result of catastrophic injuries.70 In a state that requires liability based on fault and that is known for conservative jury awards, it seems unlikely that we as a state are responsible for few, if any, of the insurance industry's alleged problems with excessive jury awards. In fact, evidence shows that by reducing our verdicts in this state through caps on damages, we will be asking the citizens of this state to subsidize the recoveries of plaintiffs in other states.71

III. Reform Studies in North Carolina

As a result of increased pressure from North Carolina residents concerning the availability and cost of insurance, the 1985 Session of the General Assembly created the Liability and Property Insurance Markets Study Commission.72 The areas of study of

68. Id.
69. Id.
70. See source cited supra note 51, at 12.
71. See source cited supra note 34.
this commission were set out as follows:

1. The availability of professional and commercial liability and property insurance in this state and factors causing and compounding diminutions in underwriting capacity.
2. The underwriting and marketing practices of admitted and non-admitted liability and property insurers and producers doing business within this state.
3. Optional methods of Risk Management and risk sharing that may be utilized by the citizens of this state.
4. The effect of diminished underwriting capacity in professional and commercial liability and property insurance on the economy of this state.
5. Any other subjects deemed by the Commission to be relevant to this study.73

This enabling legislation authorized a commission membership of twelve people allowing the Speaker of the House, the President of Senate, and the Commissioner of Insurance to appoint four members each.74

The Commission held its first meeting on October 22, 1985.75 At this meeting, plans were made for a series of public hearings around the state. These hearings were held in late 1985 and allowed the public to make presentations about their concerns relative to the commission's purposes.76 The Commission asked the insurance industry to provide high-ranking spokespersons from several insurance companies who could answer Commission questions about their views on the problems being studied by the Commission. A regional manager from one company was present to speak on the insurance industry's behalf.77

In the meantime, during February of 1986, the General Assembly, which Commissioner of Insurance James E. Long had urged to convene, held a special session. It considered giving him stand-by authority to compel the insurance industry to provide unavailable but critically needed coverage. The legislature passed such a bill in a one-day special session.78

The Commission recognized that the bill passed during the

74. Id.
75. See REPORT, supra note 3, at 57.
76. Id. at 58.
77. Id.
78. Id. at 59.
special session was designed to alleviate insurance availability problems and not those of affordability and extent of coverage. Therefore, the Commission divided into sub-committees, one to concentrate on civil justice system modifications and the other to concentrate on insurance regulation.\textsuperscript{79} After its consideration of evidence obtained at public hearings as well as other sources, it synthesized its data and drafted a single bill containing both civil justice system modifications and insurance regulation measures.\textsuperscript{80}

Senator Harold Hardison introduced the proposed legislation into the Senate.\textsuperscript{81} After a month of legislative shuffling and modifications, the Senate Insurance Committee ultimately reported the bill unfavorably with several exceptions. The favorable exceptions allowed several liability insurance regulations and a provision enacting Rule 11 of the Federal Rules of Civil Procedure as part of the North Carolina Rules of Civil Procedure.\textsuperscript{82} These portions were incorporated into another bill and ratified.\textsuperscript{83}

After the Commission's failure to pass the substantial portion of its measures in the 1986 Session, it reconvened in late 1986 to consider its future work.\textsuperscript{84} It heard several presentations from various groups and decided to continue meeting. However, the Commission decided to narrow the scope of its work to concentrate on civil justice modifications.\textsuperscript{85} Early 1987 brought several more meetings with additional presentations and more discussion of what legislature proposals to recommend to the 1987 Session. Finally, the Commission chose six topics and arranged for the preparation of draft legislation on all six of the topics.\textsuperscript{86} The six topics included: (1) a more stringent standard of proof for recovery of punitive damages; (2) required payment of part of any punitive damage recovery to the state General Fund; (3) development of a tort claims act for political subdivisions; (4) modification of joint and several liability; (5) modification of the collateral source rule; and (6) caps on non-economic damages.\textsuperscript{87}

The Commission completed and approved the draft legisla-
IV. TORT REFORM PROPOSALS NOW BEFORE THE GENERAL ASSEMBLY

As a result of its studies, the Liability and Property Insurance Markets Commission recommended that six proposals for civil justice modification be introduced before the 1987 Session of the North Carolina General Assembly. On May 4, 1987, these bills were introduced into the Senate as follows:

1. Senate Bill 826 — A Bill to be entitled “An Act to Create a Political Subdivision Tort Claims Act.”
2. Senate Bill 827 — A Bill to be entitled “An Act to Change the Standard of Proof for the Award of Punitive Damages and to Eliminate Punitive Damages Based on Vicarious Liability.”
4. Senate Bill 842 — A Bill to be entitled “An Act to Regulate the Award of Punitive Damages in Civil Cases and Provide for Itemized Verdicts.”
5. Senate Bill 843 — A Bill to be entitled “An Act to modify Joint and Several Liability so that a Defendant is Liable only to the Degree he was Responsible for the Damage Suffered by the Plaintiff.”
6. Senate Bill 844 — A Bill to be entitled “An Act to Limit the Amount of Damages for Non-Economic Losses in Civil Cases to $250,000 and to Provide for Itemized Verdicts.”

At present, the Senate Judiciary Committee II is considering this legislation, except for Senate Bill 827, which failed its second reading. A summary and criticism of each of the proposals follows.
A. Senate Bill 826 — Creation of a Political Subdivision Tort Claims Act

This bill is the Commission's response to North Carolina cities and towns' complaints of the extreme difficulty in obtaining affordable liability insurance for their activities. The bill is founded in hopes that a decrease in the liability exposure of such communities will induce the insurance industry to lower the premiums it requires each town to pay for its liability coverage.

This may seem to be a logical conclusion but, while the insurance industry has called for reforms exactly like this proposed bill, it has made no promises that enactment of this type of legislation will accomplish the intended result of reducing premiums. On the contrary, other jurisdictions that have enacted this type of reform are still experiencing the same problems of high cost and unavailability of insurance that we are now experiencing. In fact, the only thing about this bill of which we can be sure is that enactment will cause North Carolina citizens to forego their rights of redress for injuries suffered due to the negligence of political subdivisions.

This bill would require a complainant against a political subdivision to file its case in the superior court of the county where the political subdivision is located. The bill would require a complainant to allege that the political subdivision was responsible for injuries arising out of an "act of negligence." This would appear to require a positive act of negligence and preclude recovery for passive negligence allowed under the state tort claims act. In addition, there is a 180-day notice requirement that the plaintiff must fulfill as a condition precedent before an action can be filed against a political subdivision or one of its employees.

Perhaps the most important part of this bill is the damages provision. Damages are limited to $100,000 for all claimants cumulatively for injury or damage to any one person unless the political subdivision has purchased liability insurance coverage in excess of that amount.

93. See source cited supra note 51, at 7.
95. Id. at p. 2.
96. N.C. GEN. STAT. § 143-291 (1987) was amended July 1, 1979, to provide recovery for the passive, in addition to active, negligence of a state employee acting within the scope of his employment. Prior to that date active negligence was required to create a cause of action. This bill appears to adopt a standard requiring a negligent act.
97. See S.B. 826, supra note 94, at p. 2.
98. Id.
The bill imposes a two-year statute of limitations for claims against a political subdivision measured from the time that the claim arose.\textsuperscript{99} Additionally, the limitations on the claims section provides that no claims from certain governmental functions arise when performed \textit{directly} by the political subdivision, but these claims are allowed when private contractors carry out these same governmental functions on behalf of political subdivisions.\textsuperscript{100} The political subdivision would be immune from suit when performing directly the following functions:

1. making and enforcing ordinances;
2. preventing crime and operation of a police force;
3. preserving the public health;
4. fire prevention, suppression, and operation of a volunteer fire department;
5. providing services to the poor;
6. educational services;
7. animal control;
8. control and regulation of bus companies;
9. discharge of public employees;
10. maintenance of airports;
11. operation and maintenance of libraries;
12. installation and maintenance of traffic signal lights;
13. installation and maintenance of systems providing electricity for street lighting;
14. operation and maintenance of parks (where non-city income for their operation and maintenance is incidental);
15. garbage disposal (where the service is operated on a nonprofit basis);
16. any duties imposed on a political subdivision by statute;
17. any other actions or functions in exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, or when discharging a duty imposed solely for the public benefit.\textsuperscript{101}

The bill also includes a provision completely barring a plaintiff's claim for punitive damages against a political subdivision.\textsuperscript{102}

Furthermore, the bill provides for settlement of claims. A political subdivision would be allowed to settle any claim, except that of a minor, without that claim being filed in superior court, as long

\textsuperscript{99} \textit{Id.} at p. 3.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} at pp. 3-4.
\textsuperscript{102} \textit{Id.} at p. 4.
as the settlement amount was $25,000 or less. The superior court would be required to approve settlements in excess of that amount. In case of an appeal of any judgment, such appeal would act as a supersedeas and no monies would be required to be paid until a court finally determined all issues.

This bill would hamper severely an injured party’s right to recover from a political subdivision covered by this legislation. The net result would be that, as to the vast majority of government functions, the plaintiff would have no available right to redress for injuries due to the political subdivision’s negligence. The bill has admirable intentions, specifically encouraging affordable insurance coverage for political subdivisions through decreased exposure. However, there are at least two negative aspects as well. First, it denies redress to parties’ legitimate claims of injuries proximately caused by a political subdivision’s negligent act during certain functions performed by them. Second, the bill creates a disincentive for political subdivisions to use ordinary care while performing their duties because there will be little or no chance that the political subdivision will come to bear the cost of their negligence. Until the General Assembly is provided with concrete evidence that this bill will accomplish the intended purpose of lowering the cost of premiums to local communities, the General Assembly should not pass this bill.

B. Senate Bill 827 — Modifications in the Standard of Proof for the Award of Punitive Damages

North Carolina law currently provides that punitive damages may be awarded when a defendant is guilty of an intentional act, gross negligence, or willful and wanton conduct. This proposed bill would change the plaintiff’s burden of proof requirements in seeking punitive damages. The bill would require that the alleged conduct giving rise to a punitive damage claim be proved by a new standard of clear and convincing evidence. In addition, this bill would eliminate punitive damage awards based on a defendant’s vicarious liability, typically the liability of an employer or other

103. Id. at p. 3.
104. Id.
105. Id.
master under the doctrine of respondeat superior.\textsuperscript{108}

The bill's primary purpose is to make the rare award of punitive damages even rarer. As with other reforms, this bill would create a disincentive for potential defendants to maintain proper standards of care in their operations. Punitive damages are awarded as punishment for a defendant's acts and to deter other potential defendants in like situations from participating in similar conduct.\textsuperscript{109} With increased standards of proof, awards become more infrequent, which decreases their deterrent effect. Punitive damages work in the same manner as the hanging sword of Damocles — their value is that they hang as a threat over the heads of potential defendants.

It is common knowledge that many business decisions are made not out of concern for human lives and injuries but in terms of how much the loss of lives and injuries will cost the business in money damages.\textsuperscript{110} When the threat of punitive damages is lessened, so is the dollar amount for the cost of loss of lives and injuries used in the business's balancing equation. The result is less care in the decisions involving human lives and more emphasis on profitable but perhaps risky products.

It is significant that this bill or one similar may have a dismal future. Senate Bill 827 failed its second reading on May 15, 1987, soon after it was introduced.

C. Senate Bill 828 — Modification of the Collateral Source Rule

The collateral source rule excludes evidence of compensation the plaintiff receives from a wholly independent source as a result of the injury the defendant inflicted.\textsuperscript{111} Such payments are not deducted from the damages that the plaintiff is otherwise entitled to

\textsuperscript{108} Id.


\textsuperscript{110} A good example is the Ford Pinto cases. To save about $10.00 per vehicle, Ford management decided to avoid a design alternative that would have eliminated a problem in the fuel system; as a result, the cars exploded when rear-ended. Notes of these meetings were introduced into evidence by the plaintiff against Ford. The jury in one case was so outraged that it awarded almost three million dollars in compensatory damages and $125 million in punitive damages. The trial court remitted the damages to $2.5 million in compensatory damages and $3.5 million in punitive damages, which was affirmed. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

receive from the tortfeasor. In other words, a defendant tortfeasor is afforded no benefit because the plaintiff has received money from other sources due to injuries the defendant inflicted on the plaintiff. The rule often comes into play in two situations: when the plaintiff's own health insurance policy pays him benefits, or when the plaintiff is gratuitiously paid a percentage of his wages during his recovery period for injuries the defendant caused. Current North Carolina law would prohibit reduction of the plaintiff's recovery due to the plaintiff's receipt of these payments.  

Significant policy considerations create the basis for this rule. First, the rule prohibits tortfeasors from benefitting from prudent measures the plaintiff has undertaken and for which he has paid. Second, the rule encourages society to undertake these prudent measures to properly provide for society as a whole and for individual families' financial and health needs. Finally, the plaintiff has paid for these benefits, most often insurance, either by purchasing insurance himself or by accepting lesser wages for his employment. These concessions by the plaintiff allow his employer to procure insurance for him. The most common complaint about the rule is that the plaintiff somehow receives double recovery for the same injury, which results in a windfall. However, that is not the result. On the contrary, what the plaintiff receives is not a double recovery but a partial reimbursement for past premiums paid to procure the collateral source.  

This bill would modify the current collateral source rule by allowing the trier of fact to consider information about all payments from collateral sources that have been made or are available to the plaintiff. The bill further provides for evidence of setoff, subrogation, and subsequent rights to be introduced as an explanation of the collateral payments.  

This bill would make the jury's already difficult job even more difficult. More importantly, the bill directly violates North Carolina's pronounced public policy which encourages citizens to plan and provide for their future financial needs by purchasing insurance.

This bill would penalize most those citizens wise and prudent

112. Id.
113. See source cited supra note 51, at 7.
114. Id. at 8.
116. Id.
enough to provide for their family’s needs. These people, in effect, would spend their premium dollars and receive no corresponding economic benefit. The bill benefits those people who fail to plan ahead and purchase insurance, as they would receive the same benefits as those who purchased insurance without paying insurance premiums. The bill would also benefit the negligent party and his insurance company as they would no longer have to compensate the plaintiff fully even though they are responsible for the plaintiff’s injuries.

This bill directly violates North Carolina’s public policy of encouraging citizens to provide for their own financial security. The Senate Judiciary Committee II should expose this bill for what it really is and make certain that it does not become the law in North Carolina.

D. Senate Bill 842 — Regulation of Punitive Damage Awards Through Itemized Verdicts

This bill is designed to regulate punitive damage awards to injured claimants through increased disclosure. It contains two parts. The first part regulates the awards themselves while the second part provides for award disclosure to make the regulation possible.

Part one of this bill would require that forty percent of the punitive damage award be payable to the claimant, while sixty percent of the punitive damage award would be payable to the State’s General Fund. Part two of this bill would require the trier of fact to itemize the plaintiff’s total award into an amount representing compensatory damages and an amount representing punitive damages.

The bill’s purpose is to make punitive damage awards more difficult to obtain and smaller if any are obtained. Arguably, this legislation is better than other states’ measures that completely eliminate punitive damage awards because the total damage award must still be paid by the defendant. However, the bill would still

117. See source cited supra note 51, at 8-9.
118. Id. at 9.
119. Id.
121. Id.
122. Id.
123. Id. at pp. 1-2.
reduce the plaintiff's punitive damage award by sixty percent and would require that amount to be paid into the State's General Fund. Such a bill is clearly suspect constitutionally and if enacted would result in an almost certain challenge. The bill's net effect is to create revenue for this state through its citizens' injuries.

The bill's itemization provision merely creates a conduit through which the state can appropriate the plaintiff's recovery. Further, it creates a method for the court to examine clearly how the jury's total verdict is apportioned.

This bill clearly deprives injured parties' rights to recover for injuries inflicted upon them by a tortfeasor's gross negligence, intentional acts, or willful and wanton conduct. The legislature should not further limit North Carolina residents' already limited rights by enacting such arbitrary legislation.

E. Senate Bill 843 — Modification of Joint and Several Liability

The doctrine of joint and several liability enables an injured plaintiff to recover from one tortfeasor the entire judgment amount rendered against multiple tortfeasors. Each defendant is liable for the judgment’s entire amount both individually and as a group. The doctrine enables the plaintiff to obtain full recovery through one lawsuit and puts the burden on the defendants to obtain contribution from one another. The doctrine's purpose is to facilitate the injured plaintiff's recovery and is premised on a policy that the defendants, not the plaintiff, should bear the burden of apportioning liability since they caused the plaintiff's injuries.

This bill would modify this doctrine substantially by abolishing the doctrine entirely as to tortfeasors whose individual degrees of negligence are found to be no greater than twenty-five percent. Additionally, it would abolish the doctrine entirely as to noneconomic damages. The doctrine would be retained only as to economic damages and would be applied only to tortfeasors whose degrees of negligence are greater than twenty-five percent.

124. U.S. CONST. AMEND. V.
125. See supra notes 26-31.
127. Id.
129. Id.
130. Id.
To administer this change, the court would direct the trier of fact to use special itemized verdicts to apportion fault among the defendants.\textsuperscript{131} The defendants will retain the right to implead all joint tortfeasors so that all the defendants' liability can be determined simultaneously.\textsuperscript{132} Further, the bill states clearly that it in no way modifies North Carolina's doctrine of contributory negligence.\textsuperscript{133}

Joint and several liability is an essential part of this state's civil justice system. It allows the plaintiff to avoid the consequences of an insolvent joint tortfeasor and quite fairly places on the defendants the responsibility of pro rata fault apportionment. The abolishment of joint and several liability as described in this bill places the burden of recovery apportionment on the plaintiff. At the very least, this bill should be modified to provide for fault reallocation in the event of an insolvent defendant so the plaintiff is assured full recovery.

F. Senate Bill 844 — Limitation of Damages for Noneconomic Losses in Civil Cases to $250,000

This bill's purpose is to limit an injured party's recovery for intangible injuries for which no definite monetary amount can be fixed. This type of injury includes pain and suffering, loss of consortium, mental anguish, loss of capacity for enjoyment of life, and emotional distress. This bill would put a $250,000 cap on these and other nonpecuniary damages that cannot be proven to have a specific economic value.\textsuperscript{134} The jury would not be told of the limitation prior to their deliberations. They would be instructed to itemize damages on special verdicts into categories for economic losses, noneconomic losses, and punitive damages.\textsuperscript{135}

North Carolina is a conservative state made up of conservative people who perform jury functions. There is no substantial evidence to support a claim of problems with runaway juries in this state.\textsuperscript{136} In fact, high verdicts have been extremely rare in North Carolina's legal history.\textsuperscript{137} Trial judges in this state have inherent

\begin{footnotesize}
\begin{itemize}
  \item 131. \textit{Id.} at p. 2.
  \item 132. \textit{Id.}
  \item 133. \textit{Id.} at p. 1.
  \item 134. S.B. 844, 1987 Session, North Carolina General Assembly.
  \item 135. \textit{Id.} at pp. 1-2.
  \item 136. See source cited \textit{supra} note 51, at 11-2.
  \item 137. \textit{Id.} at 12.
\end{itemize}
\end{footnotesize}
authority to set aside verdicts that are clearly excessive or unduly influenced by prejudice. 138 Experience has shown they have responsibly used this authority. Caps, as proposed by this bill, are extremely arbitrary and unfair to injured parties.

Critics argue that it is impossible for a jury to determine responsibly the amount of noneconomic damages that should be awarded in a particular case. 139 However, our legal system constantly places problems far more complex than determination of damages in the jury's hands. Very few jurors understand the intricacies of corporate law, securities law, or taxation, but we have and will continue to allow juries to decide the facts of these cases. For centuries, our system has placed its full faith in the jury's hands. Two years of self-induced insurance industry management problems should not change a system based on centuries of experience.

More importantly, there is little evidence that caps will make liability insurance more affordable or available, which are the bill's intended results. 140 If caps are put into place, insurance companies have not promised that they will lower premiums and offer more insurance. In the mid-1970s there were claims that caps were needed to help the medical malpractice crisis, which caused many states to put caps on damages into law. Those states are now having the same problems with medical malpractice insurance as those states that did not enact such caps. Virginia acted early with tort reforms, including caps, and for some time was considered the model state and pioneer in tort reform. 141 Now, it too is having the same problems as other states with liability insurance cost and availability and has organized a study commission similar to our own to examine the problems. 142

Should jury verdicts actually be reduced in some cases, it is unlikely these reduced verdicts will have any impact on the cost of premiums in North Carolina. 143 When an insurance company writes a large policy, a substantial portion of this risk is resold on the reinsurance market to other companies to spread the risk of loss on that policy. 144 The large portion of these companies is for-
eign and the premiums for reinsurance are based on national loss experience rather than loss experience of the state in which the policy was written. The result is that any savings realized by limiting recoveries in this state will not reduce premium costs to North Carolina customers. Instead, the limited recoveries will be used to subsidize the recoveries of residents in other states. This is exactly why the insurance industry has not promised reduced premiums in North Carolina should these caps be passed into law.

In addition, caps on noneconomic damages have drawn constitutional objections both at the federal and state level. Arguments have been made that caps violate due process, equal protection, and open court provisions in state constitutions similar to a provision contained in North Carolina's Constitution.

The General Assembly should push for increased disclosure and regulation of the insurance industry rather than adopt caps on noneconomic damages. North Carolina residents deserve better than the current closed mouth attitude of the insurance industry.

V. Conclusion

North Carolina has acted fairly and conservatively in developing its current civil justice system. We have retained appropriately many common law traditions of tort law, taking great pains to steer clear of the liberal plaintiff-oriented changes in the law enacted by some states, both legislatively and judicially. Our judges and legislators have maintained a common sense approach to tort recovery that requires that fault be shown to recover damages for an injured plaintiff, keeping in check the sympathy they may have for an injured party while always being mindful of the practical costs and realities of potential defendants who provide products and services to North Carolina residents.

Our rewards for maintaining such a legal system have been few lately, especially in light of the insurance industry's recent business practices. Our businesses and manufacturers, especially those smaller companies so prevalent in North Carolina, have been especially hard hit by the high cost and unavailability of liability insurance. Our restraint in development of the North Carolina civil

145. Id.


justice system has been ignored by the insurance industry as it factors in national loss experience into its pricing process rather than recognizing the North Carolina residents’ common sense and conservative nature.

The issue of tort reform may be much different in California or New York or Florida. However, the General Assembly is responsible not for those states but only for North Carolina. North Carolina’s residents are not the cause of the insurance industry’s alleged problems. In fact, North Carolina residents are one reason the problems are no worse than they are. North Carolina residents should not have to subsidize recoveries of residents in other states; on the contrary, we should be rewarded for providing a favorable environment for the insurance industry to conduct their business. The General Assembly should require increased disclosure and regulation of the insurance industry, specifically regarding its recent performance in North Carolina, before enacting these proposed tort reforms. The legislature cannot solve the problems in other states’ legal systems nor should it try. It can, however, protect the limited rights of North Carolina citizens by insuring that this state does not end up making unnecessary sacrifices that are the responsibility of other states, not our own.

John P. Marshall