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1986 TORT REFORM LEGISLATION: A SYSTEMATIC EVALUATION OF CAPS ON DAMAGES AND LIMITATIONS ON JOINT AND SEVERAL LIABILITY

In 1986 more than three-fifths of the states enacted some form of tort reform legislation.¹ These reforms range from a single referendum² to more comprehensive changes.³ Although the "insurance crisis" was the most widely publicized factor that led states to adopt tort reform measures, the state legislatures also were responding to scholarship indicating that the tort system failed to achieve its objectives⁴ and therefore should be substantially modified or even eliminated.⁵

The reforms that the states adopted made several substantial changes in common-law tort doctrines, the most important of which modify joint and several liability and limit noneconomic damages. Although these two changes may serve equally well as means of resolving the insurance crisis, they do not serve equally well as means of reforming the tort system. The reforms that modify joint

¹ Of the states that did not pass tort reform legislation in 1986, Arkansas, Kentucky, Montana, Nevada, North Dakota, Oregon, and Texas did not have 1986 legislative sessions. Legislatures in other states considered but did not enact legislation, and some authorized committees to study the issue. See Nat'l Conference of State Legislatures, *Selected State Action, in RESOLVING THE LIABILITY INSURANCE CRISIS: STATE LEGISLATIVE ACTIVITIES IN 1986, COLLECTED PAPERS* (1986) [hereinafter *RESOLVING THE CRISIS*].

² See, e.g., CAL. CIV. CODE § 1431.1-1431.5 (West Supp. 1988) (referendum "Proposition 51"; abrogates joint and several liability for noneconomic damages only).

³ See, e.g., CONN. GEN. STAT. ANN. §§ 52-225a-d, 52-226a, 52-251a, 52-251e, 52-557m-n, 52-568, 52-572h (West Supp. 1988) (modifies joint and several liability doctrine, sovereign immunity, and collateral source rule; provides for periodic payments, costs for frivolous suits, and limits on attorney fees; places substantive limits on liability).

⁴ See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS 135-97* (1970); O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898, 898 (1985) ("The present method of compensating accident victims is both wasteful and ineffectual."); Pierce, *Institutional Aspects of Tort Reform*, 73 CALIF. L. REV. 917, 917 (1985) ("It is no secret that tort law performs all of its primary functions poorly."); Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 558, 664 (1985) ("Tort law is failing—failing to promote better conduct, failing to compensate sensibly at acceptable costs, and failing to do meaningful justice to either plaintiffs or defendants.").

⁵ See, e.g., O'Connell, *Alternatives to the Tort System for Personal Injuries*, 23 SAN DIEGO L. REV. 17 (1986) (suggesting statutes or contracts that require or encourage plaintiffs to accept settlement offers for all economic losses); Pierce, *supra* note 4, at 932 (arguing that an administrative agency could better develop a tort compensation system); Sugarman, *supra* note 4, at 558 (proposing that legislatures replace tort remedies for personal injury with expanded social insurance and regulatory schemes to achieve compensation and deterrence).

and several liability are consistent with the tort system's underlying objectives. The reforms that cap noneconomic damages, however, disregard those objectives and thus weaken the tort system's underlying rationale.

Part I of this Note describes the reforms and discusses their evolution. Part II discusses the tort system's objectives, and Part III analyzes the reforms' effectiveness in furthering those objectives. This Note concludes that the reforms that limit joint and several liability are appropriate while those that cap damages are not.

I THE REFORMS

A. Problems Precipitating Reform

During the early 1980s the insurance industry reacted to a period of growing losses by raising premiums and by cancelling and refusing to renew or issue certain high-risk policies.⁶ These actions by the insurance industry forced many businesses and municipalities either to reduce services⁷ or to go uninsured.⁸ Some businesses responded to increased insurance costs by raising their prices.⁹ This inability of businesses and municipalities to obtain reasonably priced insurance is commonly known as the insurance crisis.

Many commentators and even some insurance industry officials believe that the insurance industry is at least partly to blame for the crisis.¹⁰ In the 1970s, when interest rates were high, insurers overextended themselves by relying on investments rather than adequate premiums to subsidize claim losses and produce profit.¹¹ In 1984, when interest rates began to fall, insurers could no longer rely on investment income to remain profitable and were forced to raise

⁶ See U.S. ATT'Y GEN. TORT POLICY WORKING GROUP, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 6-15 (Feb. 1986) [hereinafter WORKING GROUP REPORT]; Trollin, *Controlling Insurance Costs: State Actions and Future Initiatives in the Area of Civil Justice Reform I*, in RESOLVING THE CRISIS, *supra* note 1; see also LEGISLATIVE COUNSEL BUREAU, RESEARCH DIV., REPORT TO NEVADA'S LEGISLATIVE COMMISSION, THE LIABILITY INSURANCE ISSUE 23 (1986) [hereinafter REPORT TO NEVADA'S LEGIS. COMM.]; Labrec, *The Municipal Liability Insurance Crisis*, MUN. ATT'Y, May-June 1986, at 15, 16.

⁷ See REPORT TO NEVADA'S LEGIS. COMM., *supra* note 6, at 2; WORKING GROUP REPORT, *supra* note 6, at 9-13.

⁸ See *supra* note 7.

⁹ See REPORT TO NEVADA'S LEGIS. COMM., *supra* note 6, at 2; Trollin, *supra* note 6, at 1 ("The price of products is increased to cover the cost of insurance.").

¹⁰ REPORT TO NEVADA'S LEGIS. COMM., *supra* note 6, at 2; see, e.g., WORKING GROUP REPORT, *supra* note 6, at 25; Trollin, *supra* note 6, at 1 ("part of the current problem can be attributed to poor management practices of the insurance companies").

¹¹ See Labrec, *supra* note 6, at 16; Trollin, *supra* note 6, at 1.

premiums and to refuse to underwrite high risk policies.¹²

Some critics blame the insurance crisis solely on the insurance industry and believe that tort law reform is unnecessary.¹³ However, the tort system itself must at least be suspect. In the past two decades changes in the tort system have both expanded liability and made that liability less predictable. Elimination of many sovereign and charitable immunities,¹⁴ replacement of contributory negligence with comparative negligence,¹⁵ and judicial acceptance of strict liability rules¹⁶ have all created liability where previously there was none.¹⁷ Courts have justified this expanded liability by relying on the cost-spreading effect of insurance.¹⁸ By relying on this cost-

¹² See WORKING GROUP REPORT, *supra* note 6, at 25; Labrec, *supra* note 6, at 16; Trollin, *supra* note 6, at 1.

¹³ See, e.g., F. BELLOTTI, J. VAN DE KAMP, L. THORNBURG, J. MATTOX, C. BROWN & B. LAFOLLETTE, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE 41 (1986) ("The insurance industry, rather than any sudden change in liability suits or recoveries, clearly bears great responsibility for the recent premium hikes and cancellations."); Hunter & Borzilleri, *The Liability Insurance Crisis*, TRIAL, Apr. 1986, at 42, 43 ("We believe the liability insurance crisis is primarily an insurance problem."); Stewart, *The "Tort Reform" Hoax*, TRIAL, July 1986, 89, 93 ("the plea for tort reform is in reality a ploy designed to line the pockets of the insurance industry"); Note, *An Analysis of the Proposed Abrogation of California's Joint and Several Liability Doctrine: Is Abrogation the Answer to the Insurance Industry Crisis?*, 8 WHITTIER L. REV. 263, 298 (1986) (authored by Jay M. Tenenbaum) ("'crisis' and accompanying 'hysteria' is being created by the insurance industry"); see also REPORT TO NEVADA'S LEGIS. COMM., *supra* note 6, at 5 ("Consumer organizations, trial lawyers and others believe that no real linkage exists between the liability insurance problem and tort reform, and that the liability insurance 'crisis' is being used as justification to place limits on the rights of injured people to sue for and recover damages.").

¹⁴ "The rule that charitable organizations are not liable in tort stems from an English case, *Foefees of Heriot's Hospital v. Ross*, 12 C. & F. 508, 8 Eng. Rep. 1508 (1846), in which the court reasoned that the payment of such claims would violate the purposes for which the funds were given to the hospital by the donor." J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 621-22 (1981).

¹⁵ For a discussion of contributory and comparative negligence, see *infra* note 46.

¹⁶ Under the rule of strict liability the plaintiff need not prove that the defendant is negligent. Rather, he must prove only that the defendant caused his injury. For a discussion of strict liability, see generally J. HENDERSON & R. PEARSON, *supra* note 14, at 626-49.

¹⁷ R. KEETON, *VENTURING TO DO JUSTICE* 4-10 (1969) (noting many examples of judicial reform of tort system in 1960s, including abrogation of governmental, charitable and familial immunities, elimination of obstacles to recovery for negligent infliction of emotional distress, establishment of comparative negligence, and movement toward strict liability for defective products); REPORT TO NEVADA'S LEGIS. COMM., *supra* note 6, at 5; Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 964 (1981) ("Among the leading events within tort law during the past quarter-century has been the abrogation of a variety of immunities that intruded into tort law . . ."); Simon, *Torts I*, 1983 ANN. SURV. AM. L. 641 (In the 1970s, "Courts recognized new claims, expanded the scope of existing causes of actions, and announced pro-plaintiff verdicts with increasing regularity.").

¹⁸ See, e.g., *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1974); *Helling v. Carey*, 214 Miss. 906, 55 So. 2d 142 (1951); see also Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 646 (1985) ("One of the central historical

spreading factor, courts have undermined the validity of the assumptions upon which insurance companies predict losses and set premiums.¹⁹

Another factor underlying the 1986 reforms is a basic distrust of the jury system.²⁰ In the typical tort case the jury determines both liability and damages. Commentators have expressed two major criticisms of this system. They argue that juries are biased against deep-pocket defendants²¹ and that inconsistent jury awards often lead to situations where plaintiffs with similar injuries are awarded substantially different damages.²²

These two criticisms of the jury system are not necessarily independent. Indeed, the bias against deep-pocket defendants may lead to inconsistent damage awards. One independent reason for the variance in awards is the difficulty that juries have in quantifying noneconomic damages such as pain and suffering. Because the market system does not adequately price noneconomic damages,²³ American society has chosen to rely on the jury system to place a value on them.²⁴ However, because no objective criteria exist for valuing these damages, they may vary widely and become astro-

justifications for the expansion of products liability has appealed to the availability of insurance in voluntary markets"); Schmit & Phelps, *Two-Way Causality Between Insurance and Liability*, 69 MARQ. L. REV. 33, 34-35 (1985) (case documentation of relation between extension of liability and availability of insurance); Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 681 (1985) ("Whether the insurance justification is regarded as essential or supernumerary, it is part of a conception of law that is now dominant in the United States").

¹⁹ Insurance companies base their loss predictions on three assumptions: that the information on which the prediction is based represents all loss information for the prediction period; that exposures to loss are independent and homogeneous; and that outcomes are random. Courts threaten the validity of these assumptions when they justify placing liability on a defendant because the defendant has insurance. When courts change the basis upon which they assess liability, past losses no longer represent future losses. For exposures to be independent, a change in the probability of one exposure must not affect the probability of another. When immunities are abrogated, exposures are no longer independent because when one formerly immune party is held liable the probability of another being held liable increases dramatically. Finally, if courts impose liability because defendants are insured, exposure to risk is no longer random. Policyholders can affect the amount of their potential liability by altering their level of insurance. Schmit & Phelps, *supra* note 18, at 46-47.

²⁰ The federal and most state constitutions guarantee the right to a jury trial. *See, e.g.*, U.S. CONST. amend. VII; CAL. CONST. art I, § 16; N.Y. CONST. art. I, § 2, art. VI, § 18; PA. CONST. art. 1, § 6.

²¹ *See infra* note 48 and accompanying text.

²² *See infra* note 108 and accompanying text.

²³ *See* R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* § 6.12, at 182 (3d ed. 1986) (discussing difficulty in valuing injuries); O'Connell, *supra* note 4, at 899, 892 (noting lack of market for losses such as pain, indignity, and loss of happiness).

²⁴ Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 778 (1985) ("Courts have recognized that there is no exchange value for pain and suffering or emotional distress and, therefore, have relied upon the collective judgment of the juries to quantify such injuries.").

nominally high.²⁵

Tort law is primarily common law. State legislatures have rarely initiated major changes in tort law.²⁶ The medical malpractice crisis of the 1970s, where the rising cost and scarcity of medical malpractice liability insurance increasingly threatened the health care systems,²⁷ prompted the most recent legislative intervention in tort law before 1986. In response to this crisis, almost every state enacted tort reform legislation designed to limit health care providers' potential malpractice liability.²⁸ These reforms included using alternative dispute resolution techniques such as screening or arbitration panels, providing for periodic rather than lump-sum award payments, restricting attorney contingency fees, eliminating the collateral source rule,²⁹ and capping damages.³⁰

Medical malpractice victims attacked the constitutionality of these reforms, claiming that they violated both state and federal due process and equal protection guarantees. State courts split on the constitutionality of the statutes.³¹ Commentators continue to ques-

²⁵ *Id.* at 803-05 ("Yet, without any market yardstick against which to measure their judgments, juries . . . have unfettered discretion to determine the extent of damages.") (footnote omitted).

²⁶ W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 19 (5th ed. 1984) [hereinafter W. KEETON] ("Tort law is overwhelmingly common law . . ."); REPORT TO NEVADA'S LEGIS. COMM., *supra* note 6, at 6 ("Tort law traditionally has developed through judicial declarations and reinterpretations of legal principles in individual lawsuits."); Green, *The Thrust of Tort Law: The Influence of Environment* (pt. 1), 64 W. VA. L. REV. 1, 1 (1961) ("expansion of tort law is the product of the courts with minor assistance of legislatures").

Negligence and strict product liability rules, the bulwark of tort law, all originated as common law. See F. HARPER, F. JAMES & O. GRAY, 3 LAW OF TORTS § 12.3, at 110-14, §§ 14.3-14.4, at 190-214 (1986) [hereinafter F. HARPER]. Although some states adopted comparative negligence by statute, see W. KEETON, *supra*, § 67, at 471-74, nn.31, 39-40 & 48, in many states the courts made this change. *Id.* at 471-72 nn. 28 & 31; see, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (adoption of pure comparative negligence); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) (prospective adoption of pure comparative negligence).

²⁷ See Note, *Ohio's Attempts to Halt the Medical Malpractice Crisis: Effective or Meaningless?*, 9 U. DAYTON L. REV. 361 (1984) (authored by Thomas J. O'Connell & Amy Tolnitch).

²⁸ See REPORT TO NEVADA'S LEGIS. COMM., *supra* note 6, at 6; Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 943 (1984) ("In 1975 and 1976 alone, forty-three states and two territories legislatively modified one or more significant aspects of [medical malpractice] common law.").

²⁹ Under the collateral source rule, the damages the plaintiff receives are not reduced by amounts the plaintiff receives in compensation for his loss from other sources such as medical insurance or disability benefits. 4 F. HARPER, *supra* note 26, § 25.22, at 648-50.

³⁰ Karzon, *Medical Malpractice Statutes: A Retrospective Analysis*, 1984 ANN. SURV. OF AM. L. 693.

³¹ Compare *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 164, 695 P.2d 665, 682, 211 Cal. Rptr. 368, 386 (1985) (\$25,000 cap on noneconomic damages in medical

tion the effectiveness of these reforms.³²

B. The 1986 Legislation

The 1986 tort reforms differ from the 1970 medical malpractice reforms in two respects. First, where the 1970 reforms applied only to medical malpractice claims, the 1986 reforms apply to all types of tort actions. Second, unlike the 1970 reforms, the 1986 reforms substantially modify or even eliminate the traditional joint and several liability doctrine.

In 1986 two reforms widely adopted by the states were modifications of joint and several liability and caps on noneconomic damages. Other reforms included eliminating the collateral source rule,³³ reestablishing many sovereign immunities,³⁴ limiting liability

malpractice actions and modification of collateral source rule do not violate state or federal constitution), *cert. denied*, 474 U.S. 892 (1985) and *Johnson v. St. Vincent Hospital, Inc.*, 273 Ind. 374, 390, 404 N.E.2d 585, 598 (1980) (\$500,000 cap on total damages, required submission to medical review panel, limitation on attorney's fees, reduced statutes of limitations, and prohibition against addendum clauses in medical malpractice actions do not violate plaintiff's jury trial, equal protection, or due process rights under state or federal constitution) with *Carson v. Maurer*, 120 N.H. 925, 942-43, 424 A.2d 825, 837 (1980) (restrictions on expert testimony, reduction in statute of limitations, 60-day notice requirement, elimination of collateral source rule, limitation on attorney fees, and \$250,000 cap on noneconomic damages applicable only to medical malpractice actions violates equal protection guarantees of state and federal constitutions) and *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978) (\$300,000 cap on total recovery in medical malpractice actions violates equal protection guarantee of state and federal constitutions; combination of other provisions in statute, including near elimination of collateral source rule, violates due process).

³² See, e.g., Karzon, *supra* note 30, at 696; Robinson, *The Medical Malpractice Crisis in the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 5, 30 ("Examination of individual reforms . . . indicates that most of the flurry was just that—more show than substance."); Note, *supra* note 27, at 362 ("the effectiveness of these measures in actual practice remains a controversial question").

³³ About ten states have modified or abrogated the collateral source rule. Most of these statutes provide that if the plaintiff's award is reduced because of his receipt of collateral source benefits then the plaintiff is entitled to recover the cost of securing those benefits. See, e.g., ALASKA STAT. § 09.17.070 (Supp. 1987) (plaintiff's recovery reduced only by collateral payments with no right to subrogation less costs including attorney's fees); COLO. REV. STAT. § 13-21-111.6 (1987) (plaintiff entitled to recover all payments made pursuant to contract for benefits "by or on [his] behalf"); MINN. STAT. ANN. § 548.36 (West Supp. 1988) (plaintiff entitled to recover all payments made to secure benefits by plaintiff, family, or employer within two year period beginning prior to action); N.Y. CIV. PRAC. L. & R. 4545(c) (McKinney Supp. 1988) (plaintiff entitled to recover cost of securing collateral payments within period beginning two years prior to action and subsequent payments necessary to maintain benefits).

³⁴ Various states have passed statutes giving the state immunity from liability resulting from the state's use of its licensing and inspection powers, see, e.g., CONN. GEN. STAT. ANN. § 52-557n(b)(7) (West Supp. 1988); W. VA. CODE § 29-12A-5(a)(9) (1986), its operation of prisons and hospitals, see, e.g., W.VA. CODE § 29-12A-5(a)(14) (1986), civil disobedience, riots, or the failure to provide police or fire protection, see, e.g., OKLA. STAT. ANN. tit. 51, § 155 (West Supp. 1988); S.C. CODE ANN. § 15-78-60(a)(6) (Law. Co-op. Supp. 1986), acts of third persons, see, e.g., S.C. CODE ANN. § 15-78-60(a)(20) (Law.

for certain activities or actors,³⁵ providing for periodic rather than lump-sum award payments,³⁶ and limiting punitive damages.³⁷ Reforms intended to improve the administration of the tort system include limiting attorney's fees,³⁸ imposing penalties on plaintiffs who bring frivolous suits,³⁹ and encouraging nontrial dispute resolutions.⁴⁰ Unlike many of the other reforms, modifications to joint

Co-op. Supp. 1987), and employee conduct outside the scope of official duty, *see, e.g.*, CONN. GEN. STAT. ANN. § 52-557n (West Supp. 1988); S.C. CODE ANN. § 15-78-60(a)(17) (Law. Co-op. Supp. 1987).

³⁵ Various statutes have limited liability for unpaid officers of nonprofit corporations, *see, e.g.*, ALASKA STAT. § 09.17.50 (Supp. 1987); DEL. CODE ANN. tit. 10, § 8133 (Supp. 1986); N.Y. NOT-FOR-PROFIT CORP. LAW § 720-a (McKinney Supp. 1988), persons rendering assistance in emergency, *see, e.g.*, ALASKA STAT. § 09-65-091 (Supp. 1987); COLO. REV. STAT. § 13-21-116 (1987), landowners, *see, e.g.*, COLO. REV. STAT. § 13-21-115 (1987); LA. REV. STAT. ANN. § 9:2795 (West Supp. 1988), failure to warn of another's violence, *see, e.g.*, COLO. REV. STAT. § 13-21-117 (1987); MINN. STAT. ANN. § 148.975 (West Supp. 1988), volunteer sports staff and nonprofit sport organizations, *see, e.g.*, DEL. CODE ANN. tit. 16, § 6836 (Supp. 1986); N.J. STAT. ANN. § 2A:62A-6 (West 1987), injuries to those attempting to commit a felony, *see* WASH. REV. CODE ANN. § 4.24.420 (West Supp. 1987), products liability claims against nonmanufacturers, *see, e.g.*, IOWA CODE ANN. § 613.18 (West Supp. 1987), and those manufacturing or selling guns, *see* 1986 COLO. REV. STAT. § 13-21-501-505 (1987).

³⁶ *See, e.g.*, HAW. REV. STAT. § 657-24 (Supp. 1987) (political subdivisions given option of paying judgment over five year period when judgment is greater than \$1 million); MD. CTS. & JUD. PROC. CODE ANN. § 11-109 (Supp. 1987) (court can order periodic payments for future economic damages "as consistent with the needs of the plaintiff"); MICH. COMP. LAWS ANN. § 600.6307 (West 1987) (order for periodic payments automatic when judgment exceeds \$250,000); WASH. REV. CODE ANN. § 4.56.260 (West Supp. 1987) (order for periodic payments at request of a party when future economic damages of at least \$100,000).

³⁷ *See, e.g.*, ALASKA STAT. § 09.17.020 (Supp. 1987) (must be proven by clear and convincing evidence); COLO. REV. STAT. § 13-21-102 (1987) (punitive damages must be reasonable and no greater than actual damages); MINN. STAT. ANN. § 549.191 (West Supp. 1988) (plaintiff may claim punitive damages only after hearing in which he establishes prima facie case for such).

³⁸ Many of the new statutes simply require that the attorney's fees be reasonable. *See, e.g.*, HAW. REV. STAT. § 607-15.5 (Supp. 1987) (must be reasonable as approved by court). *But see* CONN. GEN. STAT. ANN. § 52-2516 (West Supp. 1988) (establishing table for attorney contingency fees); MD. STATE GOV'T CODE ANN. § 12-109 (1987) (fees may not exceed 20% of settlement or 25% of judgment).

³⁹ These statutes variously define a "frivolous suit" as one that has no justifiable issue; is unsubstantiated by fact or law; is brought to harass, delay or embarrass; or one that is not made in good faith. *See, e.g.*, FLA. STAT. ANN. § 57.105 (West Supp. 1988) (absence of justifiable issues; costs to be assessed in equal amounts against party and attorney unless attorney acted in good faith based on representations of client); HAW. REV. STAT. § 607-14.5 (Supp. 1987) (totally unsubstantiated by facts and law; reasonable attorney's fees, limited to 25% of claimed damages); IOWA CODE ANN. § 617.16 (West Supp. 1987) (if plaintiff has brought three prior unsuccessful suits which court decides were frivolous, court may require plaintiff to post bond before suit is allowed to continue).

⁴⁰ *See e.g.*, MICH. COMP. LAWS ANN. § 600.4951-4969 (West 1987) (requires non-binding mediation in civil actions in which greater than \$10,000 damages claimed; if party rejects mediated settlement, party must pay opposing party's costs unless verdict is at least 10% more favorable to rejecting party than mediation evaluation).

and several liability and caps on noneconomic damages do not merely affect issues at tort law's periphery; rather, they substantially change its foundation.

1. *Joint and Several Liability*

Under joint and several liability, a tort victim who is injured by two or more tortfeasors may recover his total damages from any one of the tortfeasors, regardless of the portion of fault attributable to that tortfeasor.⁴¹ The tortfeasors are jointly liable because the plaintiff could sue them all and get a judgment against them jointly; they are severally liable because the plaintiff could sue any one of them individually for the total damages.⁴² Whether a defendant is subject to joint and several liability makes little difference in most cases; the one-recovery rule,⁴³ contribution,⁴⁴ and joinder of parties⁴⁵ usually assure that defendants pay only their share of damages. When one defendant is insolvent or immune from suit, however, joint and several liability affects the amount that a defendant must pay.

When states replaced contributory negligence with comparative negligence,⁴⁶ only a minority of states also eliminated joint and sev-

⁴¹ See *Riley v. Industrial Fin. Serv. Co.*, 157 Tex. 306, 310, 302 S.W.2d 652, 655 (1957) ("[W]here two or more wrongdoers join to produce an indivisible injury, all of the wrongdoers are jointly and severally liable to the person wronged for the entire damage suffered. The wronged person as plaintiff may sue one or more of the tortfeasors."); *Arminius Chemical Co. v. Landrum*, 113 Va. 7, 22, 73 S.E. 459, 466 (1913) (where the negligence of two or more persons, acting independently, concurrently results in an injury to a third, latter may maintain his action for entire loss against any one or all of the negligent parties); see also RESTATEMENT (SECOND) OF TORTS §§ 875-879 (1982).

⁴² J. HENDERSON & A. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 43 (1986).

⁴³ See *Miller v. F. Beck & Co.*, 108 Iowa 575, 577-78, 79 N.W. 344, 344 (1899) ("a person injured by an act of joint wrongdoers is entitled to but one satisfaction for the injury sustained"); *Riley*, 157 Tex. at 310, 302 S.W.2d at 655 ("[A] plaintiff having been injured by the same set of circumstances sustains but one injury and may receive but one satisfaction for such injury, although more than one person may contribute to such injury.").

⁴⁴ Although the common law rule prohibited contribution among tortfeasors, today most states allow contributions. If a defendant is held liable for more than his share of damages, he can sue his fellow tortfeasors to recover the excess. W. KEETON, *supra* note 26, § 50, at 336-41. For a list of statutes and court decisions recognizing the right of contribution, see 3 F. HARPER, *supra* note 26, § 10.2, at 41-42, nn.6-8. See also RESTATEMENT (SECOND) OF TORTS § 886.

⁴⁵ The procedural codes of most states further trial convenience by allowing liberal joinder of parties. See, e.g., N.Y. CIV. PRAC. L. & R. 1002(b) (McKinney 1976) ("Persons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action as defendants if any common question of law or fact would arise.").

⁴⁶ Under a contributory negligence regime, if a plaintiff's negligence contributed

eral liability.⁴⁷ Many people in government, business, and the insurance industry believe that a tort regime that includes both joint and several liability and comparative negligence is grossly unfair to defendants.⁴⁸ A simple example demonstrates the unfairness. Assume that a one-car accident causes injuries to a passenger. The passenger names as defendants in a tort action both the automobile driver and the municipality responsible for maintaining the road where the accident took place. Assume that the jury finds the driver ninety-nine percent responsible for the passenger's injuries and the municipality only one-percent responsible. If the driver is insolvent, the city will have to pay the entire judgment.⁴⁹

In the 1986 tort reforms, many comparative negligence states that had retained joint and several liability either limited or eliminated joint and several liability in an attempt to alleviate the unfairness that may result from the combined application of the two rules. Most of the modifications to joint and several liability apply both to economic and noneconomic damages.⁵⁰ Some states have elimi-

to his injury, the plaintiff is barred from any recovery. Under pure comparative negligence, the plaintiff's negligence never bars his recovery. Rather, the court must reduce his damage award to reflect his negligence. Under the two types of modified comparative negligence, the plaintiff's negligence bars his recovery if he is at least 50% responsible for his injury. W. KEETON, *supra* note 26, § 65, at 451-53, § 67, at 471-74. As of the end of 1986 all but four states—Alabama, Maryland, North Carolina and Tennessee—had adopted comparative negligence. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 25 (1986).

⁴⁷ For a list of approximately one-half dozen states which have eliminated joint and several liability, see W. KEETON, *supra* note 26, § 67, at 475 n.59. For a typical statute that eliminates joint and several liability, see OHIO REV. CODE § 2315.19 (Anderson 1981) ("each person against whom recovery is allowed is liable . . . for a portion of total damages allowed"). For a typical court decision eliminating the doctrine, see *Brown v. Keil*, 224 Kan. 195, 580 P.2d 867 (1978).

⁴⁸ See, e.g., CAL. CIV. CODE § 1431 (West Supp. 1988) ("Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault."); Granelli, *The Attack on Joint and Several Liability*, A.B.A. J., July 1985, at 61, 61 ("Public entities, often dragged into cases as defendants with scant liability exposure, find themselves the target defendants forced to pay off the entire judgment when codefendants can't pay."); Young, *Tort Judgments Against Cities: The Sky's the Limit*, 1983 DET. C.L. REV. 1509 ("Modern juries seem to have the impression that municipalities have access to a bottomless pot of gold from which to pay verdicts of millions of dollars rendered in questionable, and even fraudulent, cases.").

⁴⁹ See *Kaeo v. Davis*, 719 P.2d 387, 390 (Hawaii 1986). This case is of interest other than as an illustration. The Hawaii Supreme Court held in this case that the trial court erred when it refused to give the jury an instruction on the legal effect of apportioning negligence among tortfeasors. *Id.* at 396.

⁵⁰ The exceptions are California and Hawaii. In California, joint and several liability based on principles of comparative fault does not apply to noneconomic damages in actions for personal injury, property damage, or wrongful death. See CAL. CIV. CODE § 1431 (West Supp. 1988). In Hawaii, joint and several liability applies to noneconomic damages only if the defendant is at least 25% responsible for the plaintiff's injury. Joint and several liability continues to apply for all economic damages and for noneconomic

nated the rule entirely: no defendant may be liable for damages greater than those attributable to his action unless the defendants acted in concert.⁵¹ Some states provide for different liability allocation rules depending on the percentage of fault attributable to each tortfeasor,⁵² and at least one state reallocates an insolvent defendant's portion of the damages among other defendants according to their percentage of fault.⁵³

2. Caps on Noneconomic Damages

The statutory caps on noneconomic damages that legislatures enacted as part of the 1986 tort reforms vary as much among states as do the changes in the joint and several liability rule. The caps simply limit plaintiffs' damages for noneconomic losses to the amount of the cap. Under those statutes that address the procedural issue, the jury determines the amount of the noneconomic damages and the judge reduces the judgment by any amount in excess of the cap.⁵⁴

The statutory caps on noneconomic damages, most of which include or are directed at damages for pain and suffering,⁵⁵ range from \$250,000 to \$875,000 for a single claim.⁵⁶ Washington's legis-

damages as well in certain types of torts such as intentional torts, toxic and asbestos-related torts, and strict and products liability actions. *See* HAW. REV. STAT. § 663-10.9 (Supp. 1987).

⁵¹ *See, e.g.*, COLO. REV. STAT. § 13-21-111.5 (1987); UTAH CODE ANN. § 78-27-40 (1987).

⁵² *See, e.g.*, ALASKA STAT. § 09-17-080 (Supp. 1987) (joint and several liability; defendant less than 50% at fault liable for no more than twice his percentage of fault); FLA. STAT. ANN. § 768.81 (West Supp. 1988) (negligent defendant liable for no more than his percentage of the damage unless his fault equals or exceeds that of claimant); MO. ANN. STAT. § 538.230 (Vernon 1988) (in medical malpractice actions, joint liability only with defendants whose fault is equal to or less than their own); WASH. REV. CODE ANN. § 4.22.070 (West Supp. 1987) (defendant's liability joint and several only if plaintiff not negligent or defendants acted in concert); W. VA. CODE § 29-12A-7 (1986) (joint and several liability eliminated only against political subdivisions and only when defendant less than 25% at fault).

⁵³ *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572(h) (West Supp. 1987).

⁵⁴ *See, e.g.*, COLO. REV. STAT. § 13-21-102.5(4)(1987); N.H. REV. STAT. ANN. § 508.4-d(11) (Supp. 1987).

⁵⁵ *But see* MINN. STAT. ANN. § 549.23 (West Supp. 1988) (cap on "intangible" loss including embarrassment, emotional distress, and loss of consortium but does not cap pain and suffering).

⁵⁶ ALASKA STAT. § 09.17.010 (Supp. 1987) (\$500,000 except in cases of disfigurement or severe physical impairment); COLO. REV. STAT. § 13-21-102.5 (1987) (\$250,000 unless clear and convincing evidence indicates greater damages warranted; in no case more than \$500,000); FLA. STAT. ANN. § 768.80 (West Supp. 1988) (\$450,000); HAW. REV. STAT. § 663-867 (Supp. 1987) (\$375,000 except for specified types of torts such as strict and products liability, intentional torts, and environmental pollution torts); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (Supp. 1987) (\$350,000); MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1987) (\$225,000 in medical malpractice cases unless, among other exceptions, tort causes death, injury involves reproductive system, limb or

lation does not set an absolute cap, but rather provides a formula based on the average annual wage and life expectancy of the plaintiff.⁵⁷ Some states limit the caps to medical malpractice actions⁵⁸ or actions against political subdivisions,⁵⁹ while others cap all derivative noneconomic damages.⁶⁰ Finally, some states index the cap to inflation⁶¹ or provide for exceptions to the cap in cases involving very severe injuries, such as disfigurement,⁶² in an attempt to avoid grossly inadequate awards to plaintiffs.

One can only speculate whether the tort reforms of 1986 will successfully solve the current insurance crisis or prevent future crises. The effect that these reforms will have on the nature of the tort system is less speculative. The state legislatures did not evidence an intent to change the fundamental nature of tort law; thus, the reforms should address the insurance crisis in a manner consistent with the tort system's historical objectives. Limits on joint and several liability are consistent with these objectives, but caps on noneconomic damages are not.

II

OBJECTIVES OF THE TORT SYSTEM

Tort scholars suggest that three of the tort system's primary objectives are promoting justice,⁶³ deterring potentially injurious

organ wrongfully removed or vital bodily function lost); MINN. STAT. ANN. § 549.23 (West Supp. 1988) (\$400,000 for intangible losses; does not include pain and suffering); MO. ANN. STAT. § 538.210 (Vernon Supp. 1987) (\$350,000 per defendant in medical malpractice actions); MONT. CODE ANN. § 2-9-108 (1987) (\$750,000 for each claim, \$1.5 million for each occurrence against political subdivision; statute terminates in 1991); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1987) (\$875,000); S.C. CODE ANN. § 15-78-120 (Law. Co-op. Supp. 1987) (limits total damages to \$250,000 per plaintiff and \$500,000 per occurrence against political subdivision).

⁵⁷ Noneconomic damages may not exceed (.43%) x (average annual wage) x (plaintiff's life expectancy). WASH. REV. CODE ANN. § 4.56.250 (Supp. 1987).

⁵⁸ See, e.g., MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1987); VA. CODE ANN. § 8.01-581.15 (Supp. 1987).

⁵⁹ See, e.g., S.C. CODE ANN. § 15-78-120 (Law. Co-op. Supp. 1987); W. VA. CODE § 29-12A-7 (1986).

⁶⁰ See, e.g., MO. CTS. & JUD. PROC. CODE ANN. § 11-108 (Supp. 1987); WASH. REV. CODE ANN. § 4.56.250 (Supp. 1987).

⁶¹ MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1987) (caps reflect the cumulative annual percentage increase in the consumer price index); MO. ANN. STAT. § 538.210 (1986) (indexed to U.S. implicit price deflation).

⁶² See, e.g., ALASKA STAT. § 09.17.010 (Supp. 1987); MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1987).

⁶³ See, e.g., W. KEETON, *supra* note 26, § 3, at 15 ("[tort law's] primary purpose is to make a fair adjustment of the conflicting claims of the litigating parties"); SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, AM. BAR ASS'N, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4-154 (1984) [hereinafter ABA REPORT] ("a general notion of 'justice' pervades the tort liability system"); *id.* at 4-41 ("the jurisprudence of injury is rich with

activities,⁶⁴ and compensating accident victims.⁶⁵ Although the justice and deterrence objectives often require the same outcomes, the compensation objective may require an outcome inconsistent with the other two goals.⁶⁶ This potential inconsistency, coupled with the tort system's poor design for adequately compensating victims,⁶⁷ suggests that compensation is at most a subsidiary goal of tort law, and perhaps is merely a means of fulfilling the justice and deterrence objectives.

A. The Justice Objective

It is a sense of injustice that activates the tort process.⁶⁸ When someone is injured solely by an act of fate, neither the injured party nor society seeks to shift the victim's loss through the tort system. Tort actions arise only when the injured individual believes that another has wronged him.⁶⁹

indications of the grip that 'fairness' has on decision makers as a goal of law"); Owen, *Deterrence and Desert in Tort: A Comment*, 73 CALIF. L. REV. 665, 674 (1985) ("Any fair critique of the traditional tort system's capacity to compensate and prevent accidental losses must recognize that it is a system limited in both respects by its theoretical basis in corrective justice."); Weinrib, *supra* note 18, at 686 ("corrective justice is . . . the justificatory structure . . . through which private law makes good its claim to rationality."); cf. G. CALABRESI, *supra* note 4, at 24 (one principal of any system of accident law is that it must be just or fair).

Some commentators speak of "fairness" rather than "justice," but the contexts in which the two terms are used aid little in distinguishing them. This Note treats them as interchangeable in most uses but adopts the term "justice" because it implies reliance on a standard; it has more substance than does fairness. See WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 299 (1972).

⁶⁴ See, e.g., RESTATEMENT (SECOND) OF TORTS § 901(c) (1979) (purpose of tort law is "to punish wrongdoers and deter wrongful conduct"); 3 F. HARPER, *supra* note 26, § 11.5, at 98-99 (noting deterrence objective of tort law); W. KEETON, *supra* note 26, § 4, at 25 ("The courts are concerned not only with compensation of the victim, but with the admonition of the wrongdoer.").

⁶⁵ See RESTATEMENT (SECOND) OF TORTS § 901(a) (purpose of tort law is "to punish wrongdoers and deter wrongful conduct"); R. KEETON, *supra* note 17, at 147 ("The primary objective of Anglo-American tort law is fair and just compensation for losses"); Green, *supra* note 26, at 3 ("It may well be that down to this day the strongest bastion of tort law is found in the strong reaction of the human heart that one who hurts his brother should make recompense . . ."); see also Sugarman, *supra* note 4, at 591 ("Over the past few decades, it has become increasingly popular to view victim compensation as the central purpose of tort law."); Note, *supra* note 13, at 296 ("Joint and several liability exists to satisfy the basic policy of the tort system—making the injured plaintiff whole.").

⁶⁶ Cf. Smith, *The Critics and the "Crisis": A Restatement of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 777-78 (1987) (proposed tort law functions each reflect a different policy); Owen, *supra* note 63, at 674 ("tasks of establishing fair and efficient systems for compensation and accident deterrence are fundamentally separate tasks").

⁶⁷ See *infra* notes 89-91 and accompanying text.

⁶⁸ See Smith, *supra* note 66, at 783 (important element of victim's injury is "sense of injustice," defined as the "sense of having been wronged").

⁶⁹ ABA REPORT, *supra* note 63, at 12-4 ("[T]ort actions spring from one individual's belief that another has done a 'wrong.'").

The tort system offers a peaceful means of settling disputes, providing an alternative to the potentially disruptive use of self-help.⁷⁰ In addition, by punishing those who violate society's norms, tort law reaffirms the validity of those norms, thus allowing society's members to rely on them with confidence.⁷¹ To achieve both of these ends, the tort system must resolve disputes justly. Tort law seeks to effect corrective justice,⁷² which "is the understanding of interaction in terms of itself and not in terms of an extrinsically devised purpose."⁷³ Corrective justice is individualized;⁷⁴ the factfinder determines both liability and remedy solely on the basis of the dispute at hand.⁷⁵

Although the form of justice that tort law seeks to achieve is justice between the parties to a suit, societal norms shape the substance of that justice.⁷⁶ American tort law relies heavily on the notion that one must take responsibility for harm resulting from his actions.⁷⁷ At most, this notion requires a plaintiff to show that his injury was the defendant's "fault"; at a minimum, under strict liability, a plaintiff must show that the defendant's action in some way

⁷⁰ Smith, *supra* note 66, at 779; see also RESTATEMENT (SECOND) OF TORTS § 901(d) (1979) (one purpose of tort is "to vindicate parties and deter retaliation or violent and unlawful self-help"); ABA REPORT, *supra* note 63, at 3-18 ("[W]e suggest that tort law serves both as a grievance mechanism . . . and as a brake on the overt conflict that may break through the crust of civilization when injury victims have reason to believe that society is not responding justly to their plight.").

⁷¹ Smith, *supra* note 66, at 786-90.

⁷² W. KEETON, *supra* note 26, § 3, at 15; cf. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (advocating "paradigm of reciprocity," which looks only to degree of risk imposed by parties on each other over "paradigm of reasonableness" which surrenders the individual to community needs).

⁷³ Weinrib, *supra* note 18, at 686.

⁷⁴ ABA REPORT, *supra* note 63, at 12-6 (tort law seeks "balance between values of predictability and of individualized justice").

⁷⁵ See W. KEETON, *supra* note 26, § 32, at 175 ("negligence is failure to do what the reasonable person would do 'under the same or similar circumstances'"); *infra* note 86 and accompanying text.

⁷⁶ 3 F. HARPER, *supra* note 26, § 11.5, at 98 (Measures to reduce the cost of accidents "must on the whole satisfy the ethical or moral sense of the community, its feeling of what is fair and just."); Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1041 (1980) (one of overall objectives of tort liability system is "fairness, in the sense of furthering shared notions of social morality"); Smith, *supra* note 66, at 786-94 (function of tort system is resolution of disputes that arise when social norms are violated and injuries occur).

⁷⁷ Fault traditionally has been the most widely accepted reason for shifting a loss through the tort system. R. KEETON, *supra* note 17, at 148-52. Even today fault is an important consideration in invoking use of the tort system. See, e.g., WASH. REV. CODE ANN. § 4.16.160 note on Preamble—Laws 1986, ch. 305 (West Supp. 1988) ("[I]t is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured *thru the fault of others* is available.") (emphasis added); Schwartz, *supra* note 17, at 977 ("[T]he very idea of liability in tort seems tied to the assumption of liability founded on some fault-related standard.").

caused his injury.⁷⁸

B. The Deterrence Objective

The tort system seeks to deter potentially injurious activities by forcing people to internalize the costs of their actions.⁷⁹ Economic theory posits that an actor will continue to pursue an act until the act's marginal costs outweigh its marginal benefits.⁸⁰ Thus, by increasing the marginal costs of unsafe behavior, the tort system will decrease the level of such behavior.

The deterrence objective differs from the justice and compensation objectives in that it is not an absolute objective.⁸¹ Because reducing the number and severity of accidents generates costs as well as benefits, deterring all dangerous activities is not desirable. Any attempt to prevent all injuries would curtail many beneficial activities. For example, although society could avoid automobile accidents by banning the automobile, society will not accept such a high cost. Instead, society reduces the number of potential accidents by imposing costs on unsafe drivers commensurate with the harm they cause. Thus, tort law seeks to strike a balance between society's desire to prevent injuries and its need to allow some hazardous activities.

The tort system relies on the marketplace to determine the "optimal" number of accidents that society should allow.⁸² It attempts to force actors to internalize all the costs of their activities,⁸³ including costs that fall on others. Forcing actors to internalize these costs

⁷⁸ Even under strict liability the plaintiff must prove causation. W. KEETON, *supra* note 26, § 41, at 263 (noting that causation is essential element in all tort actions); *cf.* Schwartz, *supra* note 17, at 976 (arguing that the negligence conception persists even in strict liability reasoning; doctrine of strict products liability is "little more than a reasonable and moderate adaptation to the basic negligence standard").

⁷⁹ G. CALABRESI, *supra* note 4, at 69 ("General deterrence implies that accident costs would be treated as one of the many costs we face whenever we do anything."); *see also* Owen, *supra* note 63, at 670 (market deterrence fair because "persons who benefit from a good or service generally should pay for all the necessary costs of making the good or providing the service").

⁸⁰ *See infra* note 113 and accompanying text.

⁸¹ G. CALABRESI, *supra* note 4, at 17 ("Our society is not committed to preserving life at any cost."); R. POSNER, *supra* note 23, § 6.12, at 182 ("[1]t is plain that people are unwilling, individually or collectively, to incur the costs necessary to reduce the rate of fatal accidents [to zero]."); Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976, 976 (1985) ("commentators more recently have regarded the deterrent role of negligence as seeking not the elimination of all injuries, but an optimal balance between the number of injuries and the social benefits of the activities which produce them").

⁸² G. CALABRESI, *supra* note 4, at 69 (tort system determines accident costs of activities and lets the market determine optimal level of each activity).

⁸³ *Id.*; Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1289-90 (1980).

results in prices for goods or services that reflect all of the costs associated with those goods or services. People will engage in injury-producing activities only if the personal benefits of those activities outweigh societal costs.

C. The Compensation Objective

The compensation objective often is not only compatible with justice and deterrence, but also is necessary to achieve those goals. Once a court holds a defendant liable for a victim's loss, tort law requires that the tortfeasor compensate the injured party fully. Tort law attempts to compensate the injured party for all losses attributable to the tortfeasor's actions, so that the injured party is in the same position as he would have been had the tortfeasor not acted.⁸⁴ Recoverable losses include medical expenses, lost earnings, other economic losses, and, to the extent possible, pain and suffering and other intangible losses.⁸⁵ Only when the injured party is "made whole" is justice achieved.⁸⁶

Compensation furthers the deterrence objective in two ways. First, forcing tortfeasors to compensate injured parties discourages people from engaging in potentially dangerous activities.⁸⁷ Additionally, holding injurers liable for injured parties' losses expresses societal disapproval of an act, thus stigmatizing tortfeasors as wrongdoers; the stigma created by an adverse judgment may deter individuals from engaging in unsafe behavior, and the publicity connected with an adverse judgment may warn consumers away from dangerous products.⁸⁸

Although compensation may support the justice and deterrence objectives, compensation makes little sense as a primary tort objective. First, the utterly inefficient manner in which the tort system compensates victims makes it difficult to accept compensation as tort law's primary goal. Administrative costs and attorney's fees absorb a large percentage of every dollar awarded through the tort

⁸⁴ ABA REPORT, *supra* note 63, at 4-29.

⁸⁵ See generally 4 F. HARPER, *supra* note 26, §§ 25.8-25.10. Tort law does not provide compensation for all harm that results from a defendant's action. For example, compensation is not usually granted for economic loss unassociated with physical damage to the plaintiff's body or property, prejudgment interest, or attorney's fees. *Id.* at 619; RESTATEMENT (SECOND) OF TORTS § 13(2) (1979); D. LAYCOCK, MODERN AMERICAN REMEDIES 195 (1985); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 194 (1973).

⁸⁶ ABA REPORT, *supra* note 63, at 4-30.

⁸⁷ See generally Brown, *supra* note 81 (traditional view of tort law that threat of financial penalty from tort liability is incentive to avoid dangerous conduct).

⁸⁸ Fleming, *Is There a Future for Torts?*, 44 LA. L. REV. 1193, 1198 (1984) (noting sensitivity of some people, such as doctors, to stigma of adverse judgment and ability of publicity associated with torts to reduce sales of dangerous products).

system.⁸⁹ Further, long delays between an injury and compensation are common.⁹⁰ Ultimately, the compensation objective does not justify the tort system's cost.⁹¹

States could achieve the compensation objective most effectively by shifting accident victims' losses so that injured parties receive full and adequate compensation. States can best attain this by shifting losses either to those who can best afford them or to those who can best spread the costs over the broadest segment of society.⁹² Although in many cases the tort system does shift losses to those best able to bear them, this is not always the case. Further, the cost-spreading justification usually is not the stated justification for shifting losses.

The problem with viewing compensation as a primary tort objective is that it has no limits. If compensation were a primary goal of tort law, that objective would direct the system to compensate every victim fully. However, the justice and deterrence objectives limit compensation. In theory, compensation is never the primary policy concern in tort law; it is always subordinate to the dictates of justice and deterrence.

III

ANALYSIS OF THE REFORMS: WHERE ARE THE STATES TAKING TORT LAW?

The two major 1986 tort reforms limit joint and several liability and cap noneconomic damages. Both of these reforms are likely to decrease the level of care associated with some activities. Both of these reforms are also likely to decrease the amount of compensation that accident victims will receive from tortfeasors. Of these two reforms, limiting joint and several liability reduces safety and compensation in a manner consistent with both the justice and deterrence objectives. Capping damages, however, at best randomly furthers these objectives. Caps on damages are a blunt instrument; the limits on joint and several liability, because of their selectivity, better serve the objectives of tort law.

⁸⁹ ABA REPORT, *supra* note 63, at 2-2 (noting that auto victims receive only 44% of every insurance premium dollar, insurance company and agent receive 33% and lawyers and claims investigators receive 23%).

⁹⁰ 3 F. HARPER, *supra* note 26, § 11.3, at 89 (citing study of California courts showing median interval from date of complaint to date of trial ranging from 31 to 40 months).

⁹¹ R. POSNER, *supra* note 23, § 6.14, at 187 ("If compensation is the only purpose of the negligence system, it is a poor system, being both costly and incomplete.").

⁹² G. CALABRESI, *supra* note 4, at 40 (Deep-pocket notion "holds that secondary losses can be reduced most by placing them on the categories of people least likely to suffer substantial social or economic dislocations as a result of bearing them, usually thought to be the wealthy").

A. The Effect of the 1986 Reforms on the Justice Objective

Limitations on joint and several liability and caps on noneconomic damages reflect a certain systematic inconsistency in the reforms. Limitations on joint and several liability further corrective justice while caps on damages seem to disregard it.

1. *The Effect of Limitations on Joint and Several Liability*

The doctrine of joint and several liability dates back over five hundred years.⁹³ At the time joint and several liability was instituted, contributory negligence reigned and the concept of negligence was much narrower than it is today.⁹⁴ Originally, joint and several liability applied only to tortfeasors who acted in concert.⁹⁵ The justification for the doctrine is that the victim's damage is indivisible and that a wrongdoing defendant, rather than an innocent plaintiff, should suffer the burden of a codefendant's insolvency.⁹⁶ Today, parties not acting in concert may be jointly liable for a harm,⁹⁷ liability is not always based on fault,⁹⁸ and comparative negligence is the generally accepted rule.⁹⁹ Under these circumstances, joint and several liability does not further justice. Rather, joint and several liability, particularly in combination with comparative negligence, imposes an injustice on solvent defendants.

Comparative negligence provides a means by which to allocate damages. Comparative negligence also means that a recovering plaintiff is not necessarily completely innocent. Under comparative negligence, in a one-defendant case the factfinder determines the degree of responsibility of both the defendant and the plaintiff. The defendant is then only responsible for a percentage of the damages equal to his percentage of fault. In cases involving more than one tortfeasor, where one defendant is insolvent or unavailable, the solvent defendants pay a share of the damages greater than their share of the responsibility for the harm caused.

In cases where only a small percentage of the injury is attributa-

⁹³ See *Cocke v. Jennor*, 80 Eng. Rep. 214 (K.B. 1432); 3 F. HARPER, *supra* note 26, § 10.1, at 1-2 (noting that the principle of joint and several liability was established early in the common law).

⁹⁴ Fleming, *supra* note 88, at 1193 (until end of 19th century, duties of care were "kept under stringent control" or denied; assumption of risk and contributory negligence "denied recovery even to victims of proven negligence").

⁹⁵ W. KEETON, *supra* note 26, § 46, at 322.

⁹⁶ See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 588, 578 P.2d 899, 405, 146 Cal. Rptr. 182, 188 (1978).

⁹⁷ See, e.g., *Hoyem v. Manhattan Beach City School*, 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978) (school district and motorcyclist); *Kimbler v. Stillwell*, 78 Or. App. 636, 717 P.2d 1223 (1986) (store owner and murderer).

⁹⁸ See *supra* notes 16-17 and accompanying text.

⁹⁹ See *supra* note 46.

ble to a solvent defendant's action, that defendant often did not choose to deal with the insolvent tortfeasor anymore than the plaintiff did.¹⁰⁰ In many instances, the plaintiff would not have been injured without the insolvent tortfeasor's action.¹⁰¹ In such a case, holding the solvent defendant liable for a disproportionate share of the damages is unjust. However, as the percentage of harm attributable to the solvent defendant rises, the original justifications for joint and several liability again are applicable. If the harm attributable to the tortfeasors is approximately equal, it is more likely that any one of the tortfeasors alone would have caused the injury. Under these circumstances, requiring a defendant to pay any portion of the damages is reasonable. Thus, the statutes that make a solvent defendant's liability for an insolvent defendant's portion of damages dependent on the parties' percentage of fault are more finely tuned to the justice objective than those that completely eliminate joint and several liability.

Even those reforms that limit rather than eliminate joint and several liability may leave plaintiffs with uncompensated losses. Although a defendant's insolvency may result in a loss to the plaintiff, justice does not necessarily require that this loss should shift to a solvent defendant. The tort system's treatment of analogous situations provides support for this contention. For example, when a plaintiff contributes to his own harm, the defendant is not liable for the portion of the loss caused by the plaintiff.¹⁰² In addition, in cases with only one defendant, if that defendant is insolvent, the tort system does not shift the plaintiff's loss to another. A defendant's insolvency is a loss that the tort system does not normally compensate.¹⁰³

When a state decides whether to eliminate joint and several liability, it in effect chooses whether to leave a plaintiff with a loss or to impose that loss on a solvent defendant. Either choice results in a hardship to one of the parties. However, the hardship that eliminating joint and several liability places on a plaintiff is more palatable than the hardship that keeping joint and several liability places on a solvent defendant. Joint and several liability creates an injustice;¹⁰⁴

¹⁰⁰ See cases cited *supra* note 97.

¹⁰¹ See, e.g., *Kimble v. Stillwell*, 78 Or. App. 636, 717 P.2d 1223 (1986) (owner of gun store held liable for wrongful death because decedent's killer used gun stolen from the store).

¹⁰² Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 363 (1980).

¹⁰³ *Id.* at 363 ("This result is consistent with the general legal attitude toward plaintiffs who are faced with an absent or insolvent defendant; the law does not guarantee to every plaintiff a defendant who has neither of these characteristics.").

¹⁰⁴ See WORKING GROUP REPORT, *supra* note 6, at 64 ("Joint and several liability frequently . . . operates in a highly inequitable manner.").

it takes the loss of one party and shifts it to a party who is not responsible for it. A system without joint and several liability merely leaves a loss where it finds it. Tort law cannot correct all that is unjust, but it should not create injustices of its own.

The possible jury bias against deep-pocket defendants¹⁰⁵ is relevant to a discussion of the reforms limiting joint and several liability. Indeed, this bias may have prompted the state legislatures to enact the limitations, for the limitations represent an appropriate response to a perceived abuse. If juries attribute some small percentage of plaintiffs' harm to "deep-pocket" defendants only to assure that injured parties receive compensation, then joint and several liability imposes an injustice to these deep-pocket defendants. The reforms at least begin to correct this injustice.

2. *The Effect of Caps on Noneconomic Damages*

Like the limitations on joint and several liability, caps on noneconomic damages deny plaintiffs full compensation for some of their loss. Unlike the limitations on joint and several liability, however, capping noneconomic damages increases the injustice to plaintiffs. This increased injustice results because caps on such damages are independent of causation and fault.

In the tort system, the concept of justice centers around notions of causation and fault.¹⁰⁶ Capping noneconomic damages addresses neither of these notions. Thus, a court may find a defendant clearly at fault and a victim completely innocent, and yet if the jury's award exceeds the cap, the victim must bear some of the costs inflicted by the culpable defendant. Forcing victims to bear these costs does not mesh with the tort system's basic notion of justice. Indeed, capping damages in some sense unjustly enriches those defendants whose liability is capped. They gain the full benefit of their activity yet pay only a portion of the cost.¹⁰⁷

¹⁰⁵ See *supra* note 48.

¹⁰⁶ See *supra* notes 77-78 and accompanying text.

¹⁰⁷ See *supra* note 79 and accompanying text.

Although noneconomic costs are not easily valued they are real costs. *Pierce*, *supra* note 83, at 1295. Awarding plaintiffs damages for pain and suffering "is a fixed part of the American law on tort damages. Its established place in that law is implicit in countless opinions." ABA REPORT, *supra* note 63, at 5-176; see, e.g., *Gruenthal v. Long Island R.R.*, 393 U.S. 156 (1968) (holding that trial judge did not abuse discretion by allowing \$150,000 award for pain and suffering).

There is, however, an argument against compensation for intangible losses. Not compensating for noneconomic losses may reduce the loss to society. If damages for noneconomic losses cannot really compensate victims for their losses, requiring the defendant to pay the plaintiff for them imposes a double burden on society. *Ingber*, *supra* note 24, at 799. Because monetary compensation cannot remove or make up for a plaintiff's pain and suffering, the plaintiff's unhappiness continues. In addition, the defend-

Legislatures have enacted caps as a response to inconsistent jury verdicts and disproportionately large verdicts against deep-pocket defendants. The legislatures may perceive the caps as fair because they force the tort system to treat victims more consistently.¹⁰⁸ However, this consistency argument is flawed. Although victims with the same injuries will not receive radically different awards for noneconomic damages, victims who are only slightly injured may receive the same award as those who are very seriously injured. Ultimately, the caps on noneconomic damages most hurt those who are most seriously injured.¹⁰⁹ Some states have enacted statutes that attempt to cure the disproportionate effects of damage caps on severely injured plaintiffs by allowing awards greater than the caps in certain circumstances.¹¹⁰

The caps also are inconsistent with the legal system's reliance on the jury system. A jury trial is an important constitutional right.¹¹¹ By placing caps on damages, legislatures have decided that juries are incapable of determining damages. If caps on damages indicate that legislatures believe that juries cannot accurately determine damages, why should plaintiffs who are awarded less than the cap be bound by this inaccurate determination? If caps do not indicate that legislatures distrust juries, then the caps allow defendants to avoid fully compensating plaintiffs for injuries that they have caused.

B. The Effect of the 1986 Reforms on the Deterrence Objective

Both the reforms that limit joint and several liability and those that cap damages are likely to diminish the deterrence effect of tort law. Decreasing the level of deterrence is not, however, necessarily incompatible with the deterrence objective. Even if deterrence is

ant is less happy and therefore societal happiness is decreased by twice the plaintiff's unhappiness.

The fact that pain and suffering damages have been a key element of American law for a long time does not compel continuing the practice, but the long-continued acceptance of the principle and the willingness of juries to award large verdicts for pain and suffering does indicate something about community values. ABA REPORT, *supra* note 63, at 5-163, 5-182-83.

¹⁰⁸ Some commentators contend that one of the tort system's faults is that it often allows different damage awards for the same injuries. *See, e.g.,* Pierce, *supra* note 83, at 1291-94; Trollin, *supra* note 6, at 4 ("because it is difficult to assign dollar amounts to non-economic damages . . . awards vary greatly from one jury to the next").

¹⁰⁹ Carson v. Maurer, 120 N.H. 925, 942, 424 A.2d 825, 837 (1980) ("It is simply unfair and unreasonable to impose the burden of supporting the medical care industry [via caps on damages] solely upon those persons who are most severely injured and therefore most in need of compensation.").

¹¹⁰ *See supra* note 62 and accompanying text.

¹¹¹ *See supra* note 20 and accompanying text.

tort law's primary objective, deterring all unsafe behavior would not necessarily benefit society. Too much safety can be bad for society. The deterrence objective seeks to achieve the optimal amount of safety.¹¹² The statutory limitations on joint and several liability decrease deterrence consistently with the deterrence objective. The statutory caps on noneconomic damages, however, conflict with this objective.

1. *The Effect of Limitations on Joint and Several Liability*

The reforms that limit joint and several liability may decrease deterrence if liability or the fear of liability actually deters potential defendants from engaging in dangerous activities. This result follows intuitively—if defendants' potential liability decreases, they will be more likely to engage in potentially dangerous activities. Basic economic theory supports this conclusion. An actor will continue to take additional care, or continue to reduce his level of activity, until the costs of any additional care or reduction in activity equal any additional benefits he would gain from such additional care or reduction in activity.¹¹³

The benefit that an actor receives by taking additional care or reducing his level of activity is his avoidance of accident costs. Expected accident costs are the costs of injuries for which an actor expects to be held liable. Under joint and several liability, this cost depends upon the probability of an accident occurring, the likely severity of that accident, and the probability that another actor who might contribute to the victim's injury will be insolvent or immune from suit.¹¹⁴ The actor can reduce the possibility that an accident will occur either by increasing the amount he spends on safety or by decreasing the level of his activity.¹¹⁵

By eliminating joint and several liability, legislatures have eliminated an element of an actor's expected accident costs. An actor's expected accident costs no longer depend upon the probability that another actor who contributes to the victim's injury will be insolvent or immune from suit. The actor's expected accident costs will be lower for every level of care. Because the activity becomes less

¹¹² See *supra* note 81.

¹¹³ R. POSNER, *supra* note 23, § 6.8, at 173; see also Pierce, *supra* note 83 ("The entity bearing the costs of accidents will have an incentive to keep spending to reduce those costs up to the point at which marginal cost of accident avoidance equals marginal costs of accidents.").

¹¹⁴ But see Comment, *The Case of the Disappearing Defendant: An Economic Analysis*, 132 U. PA. L. REV. 145, 166-67 (1983) (arguing that if actor considers his potential for insolvency, several liability rule will result in lesser standard of care than will joint and several liability).

¹¹⁵ G. CALABRESI, *supra* note 4, at 73.

costly, the actor may engage in a higher level of activity.¹¹⁶

The effect of eliminating joint and several liability on an actor's level of care in a given activity is somewhat tempered because he will not reduce his level of care below some minimum level at which he knows that he alone can cause an injury. Although eliminating joint and several liability decreases the actor's expected accident costs at every level of care above this minimum, the accident costs decrease less as the actor's activity alone becomes more likely to cause an accident. For example, a municipality's highway department must maintain its highways to a certain safety level below which even safe and careful drivers will be injured. If the department allows bridges to deteriorate to the extent that their structure is dangerously but invisibly weakened, the highway department alone will be liable for any injury resulting from the bridge's weakened condition. Eliminating joint and several liability would not reduce the highway department's accident costs associated with improper maintenance of bridges. Because eliminating joint and several liability will only lower expected accident costs for levels of care above the minimum, the more unsafe the behavior, the less the limitations on joint and several liability will reduce deterrence.

A lower level of safety is not necessarily bad. If the tort system holds an actor liable for costs greater than those associated with his activity, he will not engage in the most efficient level of activity—he will be too safe. As a result, the price of the actor's activity will be too high relative to the price of other activities, and society will engage in a suboptimal level of that activity.¹¹⁷

Joint and several liability sometimes forces an actor to pay for costs that do not result from his activity. These forced costs lead to a misallocation of resources because actors spend too much on safety. When states limit joint and several liability, however, actors' liability corresponds more closely to activity-related costs. Thus, although limiting joint and several liability reduces the tort law's deterrent effect, it does so in a carefully tailored manner, consistent with the efficiency limitations of deterrence.

2. *The Effect of Caps on Noneconomic Damages*

Like limits on joint and several liability, caps on noneconomic damages will allow some defendants to pay a smaller damage award

¹¹⁶ *Id.* at 70 (“Failure to include accident costs in the prices of activities will, according to the theory, cause people to choose more accident-prone activities . . .”).

¹¹⁷ Pierce, *supra* note 83, at 1304 (“Because many products and activities that are dangerous are also beneficial, there is a distinct possibility that forcing complete internalization of accident costs to those entities that can best control accident costs would not produce optimum allocation of resources in important segments of the economy.”).

and they will either decrease or, at best, have no effect on deterrence. The caps will move the court system toward an optimal level of deterrence only if jury verdicts for noneconomic damages are too high. If jury verdicts accurately reflect the cost of noneconomic damages, then the caps undervalue these costs by setting arbitrary limits on them. Thus, caps do not force actors to internalize all of the costs associated with their activity, resulting in either too high a level of that activity¹¹⁸ or too little safety.

One certain effect of the caps is that actors' expected accident costs will be less for every type of behavior or level of activity that results in noneconomic losses that are greater than the caps. Thus, an actor will have less incentive to invest in safety under a system with capped damages than under one without caps. Similarly, because an actor presumably will continue his activity until the activity's costs equal its benefits, by reducing costs the caps may spur increased activity.¹¹⁹

As with the limitations on joint and several liability, the caps on damages will have no or a lesser effect on expected accident costs below a certain level of care. The caps will most affect activities that produce the greatest injuries; they will decrease deterrence the most in those activities that cause the worst harm. For small injuries the costs will remain the same, but for more serious injuries the costs will decrease.

The caps on noneconomic damages will probably decrease the level of deterrence in the tort system. Whether this decrease in deterrence is a move toward the optimal level of deterrence depends on the accuracy of jury verdicts.

C. The Effect of the 1986 Reforms on the Compensation Objective

Both limitations on joint and several liability and caps on noneconomic damages will reduce plaintiffs' compensation. Because compensation is merely one of tort law's subsidiary goals, reforms providing for less compensation do not necessarily depart from traditional tort objectives. The limitations on joint and several liability decrease compensation more consistently with justice, deterrence, and traditional tort notions of compensation than do the caps on noneconomic damages.

I. *The Effect of Limitations on Joint and Several Liability*

Limitations on joint and several liability do not alter the amount

¹¹⁸ *Id.* at 1295.

¹¹⁹ *See supra* note 116.

of compensation that plaintiffs deserve. Rather, these limitations change only what plaintiffs actually receive. Plaintiffs receive judgments for the full amount of their injuries, yet collect only that portion allocated to solvent defendants. As a result, justice is done as between the plaintiff and each solvent defendant. At the same time, each solvent defendant must internalize the costs of his activities. This internalization of costs reduces the actor's level of injury-producing activity.¹²⁰ This result coincides with the deterrence and justice objectives. Each solvent defendant compensates the plaintiff fully for the injuries attributable to that defendant's activity. Although eliminating joint and several liability may prevent full compensation of victims, compensation should not upset the result that both deterrence and justice dictate.

2. *The Effect of Caps on Noneconomic Damages*

In any system of compensation, someone must decide who should be compensated and how much these people should receive.¹²¹ In a system of limited resources, these two decisions are dependant upon one other. Traditionally, tort law limited compensation to those who were injured by the act or omission of another. The amount of compensation was typically the amount needed to recompense the plaintiff fully for the harm done.¹²² Over the years, tort law has expanded the pool of plaintiffs who are eligible for compensation.¹²³ As a result, the system has become overburdened, forcing legislatures to react.¹²⁴

Full compensation for personal injuries has always been tort law's measure of damages.¹²⁵ Clearly, the caps on damages are in-

¹²⁰ See *supra* notes 79-80 and accompanying text.

¹²¹ Schmalz, *On the Financing of Compensation Systems*, 14 J. LEGAL STUD. 807, 810 (1985) ("Each system requires a 'compensation governor,' which must blend two factors: eligibility for compensation and benefit levels.").

¹²² *Id.* at 810-11 (in traditional tort law, "[e]ligibility is controlled by the definition of fault acting jointly with the strength of the causal link," and "[t]he amount is determined by the full restoration standard").

¹²³ See *supra* notes 14-17 (discussing factors which have led to expansion of liability).

¹²⁴ See, e.g., CAL. CIV. CODE § 1431.1(c) (West Supp. 1987) ("Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums."); 1986 N.Y. Laws ch. 220, § 1, in N.Y. INS. LAW § 2344 note on legislative intent ("These events have disastrous effects . . . and threaten to undermine economic development and the delivery of essential and necessary services . . ."); WASH. REV. CODE § 4.16.160 note on Preamble—Laws 1986, ch. 305 (Supp. 1988) ("These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance.").

¹²⁵ Schmalz, *supra* note 121, at 810 ("The tort law's compensation standard has remained constant for decades in the face of sweeping changes in almost every other aspect of the law. The wrongdoer must pay the victim full compensation for the harm done.").

consistent with full compensation. These caps combine the tort system's cost and time-consumption with less than full compensation for plaintiffs.

CONCLUSION

Although limitations on joint and several liability vary among the states, generally these limitations are an appropriate means of reforming the tort system. They help the tort system achieve its goals by lessening the injustice in the system, by fostering an optimal level of deterrence, and by maintaining the tort system's traditional method of measuring damages. Limiting joint and several liability furthers tort's objectives both in theory and in the imperfect tort system that actually exists.

In contrast, the caps on noneconomic damages are inconsistent with tort law's traditional goals. They ignore the system's individualized nature and result in a suboptimal level of deterrence. Even if one assumes that the caps are accurate, they seem misdirected and out of place in the tort system. If the problem that these caps seek to correct is jury lawlessness, then, unless legislators consciously decide to change the principles upon which tort law rests, and do so consistently across the board, the jury system rather than the tort system's principle of full compensation should be reformed.

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