The Tort Crisis: Causes, Solutions, and the Constitution

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A majority of states, including Washington, have passed or are considering tort reform legislation.1 The push for tort reform comes from a combination of economically organized groups. Among these groups are manufacturers of products, suppliers of services who wish to redefine occupiers' liability, health care professionals who wish to limit malpractice claims, and local government officials who wish to limit their liability for operating governmental entities.2 These groups are arrayed against the organized bar whose interests parallel those of the public at large.3

Tort reform legislation seeks to limit recovery for pain and suffering,4 to cap attorneys' fees,5 to adopt proportional liabil-

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1. Wall St. J. Aug. 1, 1986, at 1, col.6; source: Alliance of American Insurers and the Wall Street Journal interviews. According to the article, 27 states have acted or proposed to limit liability. See Appendix for a brief review of the various proposals to limit liability.

2. See generally supra note 1.

3. Outside of insurance companies themselves, the main supporters of tort reform are the medical profession, small businesses that may be held liable under the business invitee rules, and governmental entities that either deliver services below cost or deliver "free" services. These groups can, on a local level, deliver substantial political support.

The bar represents the public because the bar is the only organized group whose interests parallel those of persons who will be injured in the future. Plaintiffs injured by the activities of the groups listed above cannot be organized politically because they are unknown until they are injured. Before the injury, they are part of consumer groups that, as we will point out, may be forced to pay higher prices for medical care, products, services, and taxes if high tort recovery is permitted to continue. The only organized economic group that has a direct economic interest in large recoveries are trial lawyers working on a contingent fee. From the lawyers' perspective, their interest in higher fees is consistent with the interests of the unknown future victims of medical malpractice, product malfunctions, injuries on business premises, and injuries resulting from not-for-profit government activities.


ity instead of joint and several liability, to adopt statutes of repose, and to eliminate the collateral source rule in cases of medical malpractice. The effect of these changes would be to reduce substantially injured parties' recovery.

At present, damages awarded for non-negligent actions have resulted in a tort system that is out of control. The


According to the collateral source rule, benefits received by the plaintiff from sources wholly independent of and collateral to the wrongdoer, which have a tendency to mitigate the consequences of the injury, may not be considered when assessing the damages the wrongdoer must pay. The rule is designed to prevent the wrongdoer from benefitting from collateral payments made to the person he has injured.


9. Capped recoveries by definition limit the amount a plaintiff would receive if the law did not impose a cap. Statutes of repose would prevent some plaintiffs from recovering anything for their injuries. Additionally, final notice requirements would prevent plaintiffs from recovering if they failed to fulfill procedural requirements. The elimination of strict liability for products sold in interstate commerce would eliminate from recovery those plaintiffs who could not prove that the manufacturer was negligent in the design or manufacture of its product. The elimination of joint and several liability and a replacement of proportionate liability where the plaintiff is partially negligent would eliminate the plaintiff's ability to recover all of his losses from a defendant that had sufficient resources. In many cases, some of the defendants might be judgment proof while others had substantial assets. See Wall St. J., Feb. 3, 1986, at 5, col. 1.

The restriction on attorneys' fees, although ostensibly for the benefit of the injured, would actually lower the total recovery for plaintiffs as a class. Large attorneys' fees allow attorneys to spend more resources both in investigation and in legal analysis to support plaintiffs' claims. A restriction on fees would limit the kinds of cases that lawyers bring to cases in which liability is clear and would eliminate the more imaginative cases that are expensive and difficult to prove. The elimination of the collateral source rule would allow defendants to take advantage of insurance benefits paid for by the plaintiff's employer, the plaintiff, or the public at large and thereby reduce the liability of the defendant for his tortious acts.

10. Whether real or imagined, the crisis is accepted as fact by the popular press. See Zuckerman, Tort Reform, U.S. NEWS AND WORLD REPORT, Sept. 7, 1987, at 68 [hereinafter Zuckerman].

One may claim that it is excessive verdicts rather than the extension of liability that has led to the tort crisis. Studies have shown that it is the lesser injuries that are overpaid rather than the more serious injuries. Further, if excessive jury verdicts were at issue, the crisis would extend to the automotive field as well. Very little of the clamour for tort reform appears to relate to rising auto-insurance rates. See, e.g., Regan Asks for Limits on Lawsuits, Tacoma News Tribune, May 31, 1986, at A3, col. 1; Satter, The Damage-Award Lottery, San Francisco Chron., May 25, 1986, (This World) at 20, col. 2; Church, Sorry, Your Policy is Cancelled, TIME, March 24, 1986, at 16; Lacayo, The Malpractice Blues, TIME, Feb. 24, 1986, at 60; Torts Control, Wall St. J., Feb. 4, 1986, at 30, col. 1. See also N.Y. Times, March 23, 1988, at 1, col. 1
chaos has led to increased insurance rates that have in some cases eliminated socially useful businesses. A notorious example is the withdrawal from the market of intra-uterine devices. In addition, many local governments have eliminated fireworks displays and have terminated other public recreations and amusements. Obstetricians and gynecologists have increasingly switched fields or ceased practicing medicine. Also, many businesses have closed because of higher insurance rates. Whether the existing tort system has systematically eliminated such useful economic activity or whether the rise in insurance rates is marginally insignificant is not clear from the existing data. Nevertheless, the political perception of harm does exist and has resulted in tort reform in Washington and in other states. The ostensible purpose of tort reform is to lower insurance rates while at the same time preserving the extensions of liability adopted by the courts since the 1960s. The preamble to the 1981 Washington Tort Reform Act articulates this purpose.

(announcement that eight attorney's general have brought an antitrust suit claiming Lloyds of London and various major insurance companies have conspired to reduce liability coverage and raise rates).


16. WASH. REV. CODE § 7.72.010 (preamble) (1987) in pertinent part states:

Tort reform in this state has for the most part been accomplished in the courts on a case-by-case basis. While this process has resulted in significant progress and the harshness of many common law doctrines has to some extent been ameliorated by decisional law, the legislature has from time to time felt it necessary to intervene to bring about needed reforms such as those contained in the 1973 comparative negligence act.

The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products. High product liability premiums may encourage product sellers and
The questions for the public are whether caps on liability and statutes of repose deal with the actual cause of the increased rates, and whether such caps on damages and statutes of repose unfairly impose costs on tort victims in violation of their constitutional rights and standards of fairness. Our thesis is that the expansion of tort liability based on strict liability or enterprise liability without regard to the proper measurement of damages in such cases is at the root of the insurance crisis rather than the awarding of excessive damages in ordinary fault cases. Stated another way, the expansion of tort liability was based upon the appropriateness of internalizing the cost of economic activity by spreading the risk among the beneficiaries of such activity, but the damages were measured under full compensation theories rather than a more appropriate insurance approach. This divergence between basing liability upon insurance principles and measuring damages upon fault principles has resulted in the failure of businesses to incorporate the legal charges against them within the price of their product. Our solution is to match appropriately damages to liability while protecting the constitutional right of individuals to life, liberty, and property. This solution necessarily includes the right of an individual to be free from intentional or careless injury to his or her bodily integrity.

I. A PROPOSED SOLUTION TO THE TORT CRISIS

A. Basic Tort Concepts

The law recognizes three kinds of torts, each requiring a

 manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion in order to deal with these problems.

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the State of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.

17. Under the fault system a business might not be able to include full tort recovery from negligence in the price because its competitors that use cost justified care would not incur such expenses and could undercut the negligent manufacturer's price. On the other hand, no manufacturer could avoid paying damages for losses arising from unavoidable accidents and such damages would be included in the price of the product.
different damage rule. The three kinds of torts are intentional, negligent, and strict liability.

The law of intentional torts defines rights and prevents infringement of life, liberty, and property. Clearly anyone who intentionally invades the known interest of another should pay the consequences. Thus, in intentional torts, all damages flowing from the tort, not merely those proximately caused by the tort, are recoverable. Damages include loss of dignity as well as general damages. The reason for a liberal damage rule is that the law of intentional torts, like the criminal law, seeks to deter particular acts. Hence, when losses arise from intentional torts, we always decide that the loss should be borne by the tortfeasor rather than by the victim.

Unlike intentional torts, negligence involves the careless doing of lawful acts. We have no interest in deterring the basic act itself but only in deterring the careless performance of that act. For example, we do not wish to prevent individuals from moving vehicles from one place to another, but we do wish to deter carelessness in the moving of vehicles. Carelessness is always a relative act. Driving 200 miles per hour on the salt flats of Utah to test the durability of an automobile is not careless, whereas driving 45 miles per hour on a busy Manhattan street is careless. Thus, whether an act is negligent depends upon the circumstances under which the act is performed.

According to Judge Learned Hand's generally accepted test for optimal social efficiency, when an act is negligent, the probability that injury will result must be balanced against the cost of avoiding that injury. The formula requires that the

18. The basis of intentional tort is a direct interference with the life, liberty, or property of another. Trespasses are actionable even when punitive damages are unavailable because mere interference with such rights clearly limits them.

19. In addition, one may obtain injunctions, punitive damages when allowed, and damages for insult to dignitary interest. DOBBS, REMEDIES § 7.3 (1973).

20. Id. at § 12.

21. The intentional invasion of another's legal rights shows a disregard not only for the rights of the individual whose rights one has invaded but society's distribution of legal rights. The imposition of liability is a minimum we can expect to support the legal system.

22. Judge Learned Hand summarized and applied these principles in two important decisions, Conway v. O'Brien, 111 F.2d 511 (2d Cir. 1940), rev'd, 312 U.S. 492, and United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947).

Since there are occasions when every vessel will break away from her moorings, and, since, if she does, she becomes a menace to those about her, the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of
actor make a prior judgment. Logically, the actor can predict only those risks of loss that would be generally foreseeable. Obviously, the actor cannot take precautions against unknown losses or losses that can be known only at the time of the action. Because the purpose of the law of negligence is to deter careless activity, the rules of negligence allow injured parties to be compensated for losses resulting from careless acts by others. To the extent that a direct relationship exists between the careless activity and the interest invaded, the law requires that the tortfeasor, rather than the victim, bear the loss.23

Under Judge Hand's formula, a manufacturer is not negligent unless he or she fails to take a cost-justified precaution. For example, use of the sample method of inspection is not negligent if the cost of inspecting a product sample would give a 95% assurance of eliminating defective merchandise and the risk of loss for the sale of defective products was less than the cost of inspecting 100% of the products produced. Using the sample method would also lower the cost of producing the product and under competitive conditions would result in a lower overall market price for that product. Thus, as a group, consumers of the product would benefit from the manufacturer's failure to take unjustified precautions.

Nevertheless, someone will be injured by a defective product not spotted by the sample method of inspection. One could readily argue that a user of a product should not bear a loss

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adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; i.e., whether B < PL.


Some commentators have been critical of Hand's risk-benefit method for rendering safety decisions and resolving accident disputes, with its emphasis on economic efficiency and its implicit denial of "soft" or "human" variables and individual rights. See, e.g., Rodgers, Negligence Reconsidered: The Role of Rationality in Tort Theory, 54 S. CAL. L. REV. 617 (1980); Hubbard, Reasonable HUMAN Expectations: A Normative Model for Imposing Strict Liability for Defective Products, 29 MERCER L. REV. 465, 468-69 (1978).

In certain contexts, courts sometimes do appear to protect "rights" over efficiency, as, for example, by entitling an actor to rely upon the expectation that others will act with reasonable care and otherwise obey the law. Cf. Hallett v. Stone, 216 Kan. 568, 534 P.2d 232 (1975) (driver forced to brake abruptly had no duty to look to rear but could rely instead on duty of driver in following car to proceed with care).

caused by a manufacturer's failure to take an unjustified precaution merely to lower the price for the majority of users. The failure to impose liability on the manufacturer would result in the unlucky purchaser subsidizing the other purchasers of the product. On the other hand, testing 100% of the product could price the product out of the market.

The theory of strict liability evolved to redress the harm caused by a manufacturer's non-negligent failure to inspect 100% of the products produced. Strict liability in tort, as established by Dean Prosser and Justice Traynor, derived from Judge Hand's formula, as well as from warranty law. For example, under an implied warranty of fitness, it was not necessary to determine whether an injury resulted from failure to take justified or unjustified precautions. The warranty itself was sufficient to secure for a purchaser the benefit of his bargain.

Strict liability is also called enterprise liability. The enterprise essentially internalizes unavoidable losses by including those losses in the cost of its product. Fault is irrelevant.

24. One might argue that the unlucky customer had exchanged the lower price for the lack of coverage and that he could use the money saved to buy accident insurance. First, the purchase of such insurance would have a substantial transaction cost so as to be uneconomical in most cases; second, the pool being insured would, in most cases, not be as coherent a group regarding the particular risks as the actual group of purchasers.


27. This statement of strict liability does not, of course, include strict liability for ultrahazardous activities. In those activities, the injured party is a stranger to the enterprise, his losses are similar to those of an injured party in a negligence action, and he should recover all of his damages.

Nuisance cases, inverse condemnation actions, and actions arising out of ultrahazardous activities, although involving strict liability concepts, are not adaptable to the insurance-pool solution proposed infra. These cases all involve "takings" of the adjoining property, and the full value of the taking must be paid. The analogy in these cases is to the intentional tort of trespass rather than to the concepts of product liability, common carriers, and industrial accidents. The difference between liability in ultrahazardous activities and negligence is that the person who is in control imposes a non-reciprocal risk on others.

Under the law of warranty, a purchaser may recover for a defective product; however, consequential damages may be limited by contract. The issue is whether the consequential damages, apart from personal injury, should be limited to those damages that are generally applicable to the group as a whole. The text argues that the effect
Internalizing the costs of an enterprise is the antithesis of negligence, the social purpose of which is to ensure that the actor pays all avoidable costs and that unavoidable costs be shouldered by the person who is injured by chance. 28

B. Internalization of Losses by Groups Supporting Tort Reform

The push for tort reform is motivated by a need for greater availability of insurance at affordable rates. The groups supporting tort reform can avoid liability for intentional or negligent tortious conduct by modifying their behavior or adopting necessary safeguards. But liability for unavoidable losses—strict liability—can be minimized only through insurance. It is thought that by limiting the amount that juries may award, insurance payouts will decrease; as a result, rates will drop and coverage will become more available. This solution, however, is constitutionally defective, as we shall show in Part II. A better solution for insuring against unavoidable losses that can be employed by each group supporting tort reform consists of internalizing those losses.

In product liability cases, for example, the loss is internalized to the extent that it is borne by customers or users of the product. Any increase in unavoidable costs results either in higher prices or in the non-availability of the goods or services. Allocation of funds to compensate injured parties for unavoidable losses must, therefore, be fairly distributed over the group of awarding damages arising from no-fault liability is comparable to a group of customers buying a product together with an insurance policy to cover no-fault risks.

Although strict liability from the sale of products derived its name from cases involving ultrahazardous activities, see, e.g., Rylands v. Fletcher, 159 Eng. Rep. 737 (1865), the basis of product liability is quite different from liability arising from ultrahazardous activity. In product liability, as we have shown, the whole class of users benefits when the enterprise does not take non-cost-justified safety precautions. On the other hand, individual parties injured by ultrahazardous activities should be fully compensated in the same manner as plaintiffs in nuisance or inverse condemnation cases. In ultrahazardous activity cases, as in nuisance and inverse condemnation cases, the party causing the damage is essentially asking others to bear a non-reciprocal risk.

It is obvious that the damages to an adjoining landowner from ultrahazardous activity should not be treated under an insurance principle. Because an adjoining landowner receives no direct benefit from the activity, all of his damages should be included within the cost of the ultrahazardous activity. The basis of liability in such cases is private necessity. See, e.g., Vincent v. Lake Erie Transport Co., 109 Minn. 456, 124 N.W. 221 (1910).

of product users.\textsuperscript{29} Under these circumstances, the users of the product are like an insurance pool. Logically, members of the pool would prefer to exclude anyone who is particularly susceptible to damage or who could be damaged to a degree not characteristic of the average person in the pool. The problem of special susceptibility is generally handled by a warning or by the exclusion of persons who misuse the product.\textsuperscript{30} The problem of uncharacteristic damages such as the loss of high income, however, is not covered, since atypical customers do not pay more for their goods or services. As a result, the law protects high income people from loss more than it does low income people who are injured by the same non-negligent act. This reverse socialism is inconsistent with the manner in which the law treats other strict liability or warranty claims in property.\textsuperscript{31}

In warranty or common carrier liability other than personal injury, liability is limited except where an additional charge is made according to value.\textsuperscript{32} No reason exists for failing to apply this formula to personal injury cases, since it is easier and more efficient to require that the user buy insurance for his special characteristics than to impose the obligation for those characteristics upon other members of the group. This position is consistent with the reasoning that extended product liability to users and purchasers of goods who were injured without fault. As we have pointed out, to expect a particular injured consumer to bear the risk of an unavoidable injury so that other consumers may purchase the product at a more reasonable price is clearly arbitrary. Similarly, it is equally unfair for the majority of consumers to bear the costs of a loss for

\textsuperscript{29} One might argue that the partial costs of strict liability are borne by the stockholders because the higher price will result in lower sales. This would certainly be true if full negligence damages are continued. However, if an amount equal to the cost of insurance for unavoidable risks is added to the price, the insurance cost will be borne by the consumers, assuming a competitive industry.

Insurance costs are no different than any other manufacturing costs and must be included in the price of the product, since all producers will have similar costs. Stockholders will be effected only during a transition period if excess capacity exists because demand was artificially enhanced by externalizing such costs. If strict liability is perceived as a cost of the product, all users of the product must be fairly charged.

\textsuperscript{30} See \textit{Restatement (Second) of Torts}, § 402A, comment j (1965).

\textsuperscript{31} Under warranty law the warrantor is liable for consequential damages only if foreseeable. The foreseeability element allows the seller to either charge more in special circumstances or enter into an effective disclaimer. See U.C.C. § 2-715(2).

\textsuperscript{32} See, \textit{e.g.}, 49 U.S.C. § 1073 (1982) (provides for a limit of liability to the amount declared on the shipping documents).
which they would not receive an equal benefit, that is, equal damages, if they were injured.\textsuperscript{33} The solution to this problem under warranty law, the paradigm for strict liability, is to reduce or eliminate the buyer’s obligation to pay for a defective product and to permit the seller to limit consequential damages to a liquidated amount. By contrast, section 402A of the Restatement of Torts prohibits any limitation on consequential damages for personal injury when liability is imposed for defective products.\textsuperscript{34} Section 402A states that in a no-fault situation the group must subsidize an individual plaintiff.\textsuperscript{35} The solution in tort law is to limit damages to those reasonably anticipated among the generality of the product’s users.\textsuperscript{36}

The price of a product, then, should include both an implied warranty of merchantability and a personal injury pol-

\textsuperscript{33} A requirement that full tort damages be paid under strict liability violates the insurance principle of equal premiums for equal risk. In product liability cases, all members of the class covered pay the same price for the product and therefore the same price for the coverage allowed by strict liability. Tort damages under the fault system require the tortfeasor to take the plaintiff as he finds him. Thus, negligent defendants must pay for damages resulting from the special characteristics of the plaintiff, Vosberg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891); and for payment for lost income, even though one person’s income may be eight to ten times as great as payment for pain and suffering, assuming such payment is subject to actuarial evaluation. Because of these variations, it is difficult, if not impossible, for producers to purchase actuarially sound insurance for the risks involved, and the premiums required to purchase such insurance must include an additional amount to cover the uncertainty of the risks. The additional premium to pay for uncertainty and to pay damages for the more susceptible members of the class of customers may price the product out of the reach of many of its customers or require that the product be withdrawn from the market altogether.

\textsuperscript{34} Restatement (Second) of Torts § 402A (1965).

\textsuperscript{35} Id.

\textsuperscript{36} See Insurance Crisis, supra note 11, at 1542. As we have previously pointed out, each purchaser is a member of a class that benefits if the manufacturer does not employ non-cost-justified safeguards. On the other hand, there is no reason that one party should bear the full loss of the risks in using a product. The solution, therefore, is to pay the losses of the particular injured person, but only to the extent that such losses would have equally affected the other purchasers if by chance they were injured. A non-subsidized solution would require that there be a direct relationship between the increased price of the product to each individual commensurate with the risk of including that individual in the pool. Strict liability should cover each customer equally when each customer pays the same price for the product. Any coverage over and above that unmeasurably applicable to the members of the pool should be purchased in the market by the members of the pool. See infra note 37. This concept would require some statistical evidence on the income distribution of purchasers of particular products. If this concept were adopted by statute, one could provide general schedules for classes of products like automobiles, lawnmowers, and the like. Obvious luxury products would have higher lost income schedules than mass-market products.
icy to cover medical bills and the loss of income of an ordinary user of the product. The insurance policy should not include damages for non-economic losses, such as pain and suffering or disfigurement. Under such a system, the manufacturer could treat the risk of loss as an internal expense, while consumers would benefit by being covered for unavoidable losses.

One might argue, however, that if we did not impose full tort recovery under a strict liability system, it might be more reasonable to have society as a whole, or individuals themselves, carry first-party insurance to cover actual losses. Such a system, however, would not impose the appropriate losses on the group benefitting from the services nor could the system deal with the problems of collateral benefits that arise when insurance is purchased by an individual rather than by society as a whole. By specializing losses, activities that have a higher risk would not be subsidized by lower-risk activities and costs would be imposed only on persons who actually benefit

37. Non-economic damages should not be included for two reasons. First, the variations in the group would be emphasized by allowing some person to obtain more coverage than others while paying the same price for the product; and second, this coverage does not currently exist in the insurance industry and it is very difficult to price. The second reason results from the first as well as the difficulties of accurately measuring such losses. Presently, one cannot purchase accident insurance to cover pain and suffering or emotional losses. The problems of a family evaluating these amounts after an accident relative to the generality of the group prevents such policies from coming into existence because of adverse selection. Purchasers need only ask whether they would buy insurance in a pool where the cost of the premium would cover such claims. The purchaser would fear that the cost of his coverage would be so indefinite that he could not risk belonging to the group. See also Insurance Crisis, supra note 11, at 1547.

38. As we have pointed out, the pool of persons in a comparative market who benefit from the manufacturer's decision not to take a non-cost-justified precaution consists of the manufacturer's customers because they can purchase the product at a lower price. Price in a competitive market is based on cost including a reasonable return on capital (profit). When the manufacturer does not take the unjustified precaution, every customer is potentially at risk and every customer receives the benefit of the lower price. Strict liability is therefore analogous to requiring the producer to sell the product tied to an accident policy to protect the unlucky customer who will be injured by the defect. Since the tie-in of the accident policy cannot be price adjusted for the property loss of particular customers, a uniform recovery is required to prevent certain customers from obtaining more protection from their purchase price than others.

39. As the text points out, requiring the injured individual to bear the full cost of unavoidable defects would fail to charge the industry with the full cost of producing the product in question. A rule of no liability or a rule of full liability would not allow the industry the benefit of any insurance recovery by the individual. If a product is to bear the full cost properly attributable to its sale and production, a rule similar to that suggested must be adopted.
from the risk.40

Occupiers' liability is similar to product liability in that occupiers supply services to a group of consumers. Although the language of negligence has never been officially abandoned, the duty to provide a safe environment in stores and places of amusement is closer to the liability of common carriers than to Hand's negligence standard. Thus, the occupier is generally held liable for a defect without regard to whether the costs of protecting the injured party exceeded the amount of foreseeable injury.41 The cases that clearly demonstrate this approach are those that impose liability for failure to patrol the premises sufficiently to prevent injury by illegal actions of third parties.42

Imposing some liability on occupiers for losses arising on their premises is certainly not improper. Users of the premises benefit from the service in the same way that customers or users of manufactured products benefit from the use of goods. Including a fixed insurance policy as a tie-in to the sale of products or the use of facilities fairly distributes the costs of unavoidable risks among the persons benefitted. By the same token, users should not subsidize the damages incurred by persons with special talents or peculiar susceptibilities when there is no question of fault.43

Like occupiers, medical practitioners provide services to a group of consumers. Initially, strict liability concepts may seem inapplicable to medical practitioners. By definition, malpractice requires some negligence to permit recovery. In medical malpractice, the tasks involved are so complex that it is often difficult to determine that a part of the task did not meet professional standards. Thus the line between medical judgment and negligence is not one that lay persons can easily

40. The suggested system of internalizing costs assures that industries will bear their own costs. Assigning the loss to the individual or to society as a whole through welfare or general health insurance would lead to a subsidy of inherently risky activities. This system would throw together persons who purchased products such as hang gliders with persons purchasing ordinary furniture. A general insurance payment would require the risk adverse person to pay the losses of persons who enjoyed risk.

41. PROSSER AND KEETON, supra note 23, at 427-28; Geise v. Lee, 84 Wash. 2d 866, 529 P.2d 1054 (1975). Note that the duty to protect invitees exists whether or not the cost of preventing the injury exceeds the possible losses from such injury.


43. See supra note 33.
pinpoint in ordinary litigation, and juries tend to err on the side of finding negligence. On the other hand, permitting this judgment to be made by medical boards, as proposed in some legislation, would leave the victim at the mercy of the profession's self-interests. Using the former approach has led to something like strict liability, whereas the use of medical boards would lead to a denial of access to the courts by injured plaintiffs.

The solution lies in dealing with this matter in the same manner that we suggested for product liability. In some ways, the insurance concepts discussed above are more applicable to the delivery of medical services than to the delivery of products because the insurance can be tailored to the individual case. The relationship of health care provider to patient is similar to that of customer and manufacturer with one exception: no privity of contract exists between the manufacturer and his customers, and the large number of customers prevents tailoring of individual contracts. Privity of contract does exist, however, between the health care provider and his patient. The relationship can, therefore, be tailored to the needs of the parties.\(^{44}\) Unfortunately, the medical profession has limited the use of individual-practitioner contracts. The prevailing standards prevent the professional from warranting his work or guaranteeing against bad results.\(^{45}\)

When supplying medical services, the health care provider is liable under the doctrine of informed consent if he fails to inform the patient of risks inherent in a particular treatment. If the injury or disability described does in fact result from the treatment, the patient cannot claim negligence, since by definition the risk was inherent in the treatment and could occur

\(^{44}\) One might argue that the patient could equally insure against the risk. However, the doctor is clearly more knowledgeable concerning the risk and the necessary consequences of a bad result. Further, if the doctor covers the risk there is no problem of dealing with the collateral benefits rule. Of course, the patient is free to buy additional coverage for losses not included within doctors' coverage, such as loss of special skills.

\(^{45}\) See, e.g., Gault v. Sideman 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963) (contract to cure unenforceable). It is clear that specific contracts will be enforced but both the profession and the country consider them unethical. See Safian v. Aetna Life Ins. Co., 260 N.Y. App. Div. 765, 24 N.Y.S.2d. 92 (1940); Annotation, Recovery Against Physician on Basis of Breach of Contract to Achieve Particular Result or Cure, 43 A.L.R. 3d 1221 (1972); see also American Medical Association Principles of Medical Ethics, reprinted in, 164 J. A.M.A. at 1484 (July 1957).
even though the services met the highest professional standard.

Because professional standards prevent the practitioner from warranting his work, the risk of a bad result is imposed upon the patient. Thus, when a bad result occurs, the patient has a substantial interest in suing. His claim will either be that the health care provider failed to give information necessary for informed consent or that the provider's services fell below professional standards.

On the other hand, if the health care provider could warrant or insure against the risks inherent in a particular treatment and include the cost of insurance for additional medical care in the price of his service, many malpractice suits might be avoided. Coverage could be limited to subsequent medical care and disability payments and could exclude pain and suffering as well as other non-economic losses. Moreover, if the health care provider insured against the risk, the collateral source rule need not be invoked.\(^46\) Finally, if the risk of a bad result were included in the fee, actual payment would normally come from pre-tax dollars as a health insurance fringe benefit.\(^47\) Such a system would not prevent appropriate malpractice suits. However, those suits could be limited by allowing the health care provider to make an offer of judgment for payment of non-economic costs. A refusal to accept the payment could then be used to impose costs on the patient if the jury refused to award more than the amount offered by the health care provider.

Another major group supporting tort reform consists of municipal and county officials who have recently been held liable for injuries arising from the delivery of governmental services.\(^48\) In these cases, the users are the public at large, and the

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46. See supra note 8; see also supra note 36. If the loss is covered by the medical practitioner's own insurance policy rather than by the patient's health insurance, there is no question of collateral benefits. This would be true even when the patient's health insurance had paid for the direct fee of the medical practitioner which in turn paid for such insurance coverage.


48. The withdrawal of government services has been real. See supra notes 11 & 12. Free or non-charged government services, such as parks and athletic facilities, cannot be expected to cover losses arising from non-negligent risks because no fee is charged. Such risks must be borne either by the taxpayer or the individual user. One could argue against non-negligent liability in such cases because there is no pool to bear the cost through higher user fees. Design defects in highways, however, should be
injured parties are members of the public. Obviously, considerations of fairness would induce juries to grant some sort of recovery to a party injured by a defect in the delivery of public goods. Accordingly, there is good reason to prevent especially large recoveries for persons who suffer extensive losses because of their peculiar characteristics.

The only reason for limiting liability for the negligence of public officials is because the public is not engaged in profit-making operations and thus should not be held responsible. This argument does not bear close scrutiny in cases of ordinary negligence but should be sufficient to immunize the public from punitive damages.

A more difficult problem is the imposition of strict liability on public bodies even on the limited bases proposed above in the discussion of occupiers' liability. Public facilities and activities are much more diverse than those of any particular private party. Further, the nature of many public activities makes supervision and control more difficult for public officials than it is for the average businessman. Also, because access to most public activities is free, additional costs cannot be imposed on a specified group of users through increased prices for access to the activity or facility. This last difficulty has resulted in political pressure by public officials to obtain immunity from suit. As the distinction between negligence and strict liability for defective performance has faded, public officials have been held liable for full compensation on what is essentially a strict liability standard.49

Because in most cases no particular group of consumers is available to pay an additional fee, the cost of compensating injured parties must be borne by the taxpayers. In turn, the taxpayers, many of whom might not be using the particular facility, may opt to close facilities and services rather than pay for those that have limited appeal. Proposed solutions are either to exempt public facilities from liability except in cases of active, intentional fault or to adopt a limited system of compensation modeled on victim's compensation or worker's compensation statutes. The latter solution seems preferable

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49. See, e.g., Hendry v. Manser, No. A8402-00697 (Multnomah County Cir. Ct., Ore., filed July 17, 1985; reported in 29 ATLA 21 (1986)); Hamblin v. County of Los Angeles, No. C3282 (Los Angeles County Super. Ct., Cal., filed Oct. 1, 1985; reported in 29 ATLA 78 (1986)).
because some redress would be available to individuals who are injured through no fault of their own and the cost could be determined like that of maintenance costs in public budgets.

C. Summary

The extension of full tort recovery to cases based on strict liability rather than fault has made it impossible to develop coverage that can properly be included in the price of the product due to the uncertainty of possible claims. If we recognize that strict liability in tort is based on insurance principles and should be administered on these principles, the tort crisis would dissipate without destroying the fault system. The problem with the remedies proposed under the various tort reform acts is that they fail to incorporate these insurance principles. More importantly, some of the attempts at alleviating the tort crisis, such as limiting recoverable damages, effectively deprive tort victims of their constitutional rights without due process of law.

II. The Constitutionality of Washington's Tort Reform Act

According to the preamble of the Washington Tort Reform Act, the purpose of limiting recovery is to lower the cost of insurance for the community as a whole. The increased costs are due in part to judicial extensions of liability. Yet the solutions proposed by the Act are not to curtail those extensions but to limit the amount that can be recovered for non-economic injuries such as pain and suffering and permanent disability. Limitations apply no matter how grievous the fault. As such, these limitations amount to a taking. For the state to take property from one person and transfer it either to another person or to the public in general is inappropriate. According to Justice Chase in Calder v. Bull:

An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . . A few instances will suffice to explain what I mean. A law punish[ing] a citizen for an innocent action . . . . A law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law

50. WASH. REV. CODE § 7.72.010 (preamble)(1987). For full text of statute, see supra note 16.
that takes property from A. and gives it to B.\textsuperscript{51}

More recently, the Supreme Court stated in Nollan v. California Coastal Comm'n:\textsuperscript{52}

Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.\textsuperscript{53}

An analogy to tort reform legislation is appropriate. If the purpose of tort reform legislation is to transfer losses from the tortfeasor to the victim by limiting recovery, the result is the same as transferring an easement from a private person to the state for the public benefit. As the Supreme Court indicated in Nollan, although the legislature does have the authority to redefine property rights for a public purpose so as to eliminate a person's right to exclusive use of his property, the person must be provided just compensation.\textsuperscript{54} On the other hand, if the restriction is merely procedural and serves to increase the fairness and the efficiency of dispute resolution, then the restriction is valid even if at times it would reduce recovery. For example, the provision of Washington's Tort Reform Act that eliminates joint liability of the tortfeasors when the plaintiff is partially at fault\textsuperscript{55} serves to increase fairness because a plaintiff and a defendant, both partially at fault, will be compelled to seek recovery from other defendants who caused the accident. For the same reason, notice requirements, discovery requirements, and other adjustments on the burden of production or the burden of persuasion are reasonable regulations of dispute resolution and are not transfers of property from A to B or from A to the public at large.

A legislature may not redefine a person's right to bodily integrity so that the state or other persons may intentionally or negligently touch or injure him or her. To the extent that a

\textsuperscript{51} Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis added).

\textsuperscript{52} 107 S.Ct. 3141 (1987).

\textsuperscript{53} Id. at 3141, 3148.

\textsuperscript{54} Id. at 3150.

particular limitation on liability redefines one’s right to be free from intentional or negligent injury, it should be unconstitutional as a violation of due process and of the just compensation clause of the fifth and fourteenth amendments and article I, section 3 of the Washington State Constitution. The duty of the state under the fourteenth amendment is to protect the life, liberty, and property of its inhabitants. This duty was imposed on the states to ensure that all classes of legal property and all persons would be protected. The fourteenth amendment incorporated John Locke’s proposition that the purpose of government is to protect life, liberty, and property, and that the purpose of legislation is to improve the procedural protection of life, liberty, and property and not eliminate or destroy them. Moreover, the fourteenth amendment included the proposition that the state could not take property for public use without just compensation.

The counter-argument to Locke’s proposition is that property or rights do not exist in the abstract but must be defined by law. Thus, the right of a person to be free from the intentional or negligent infliction of bodily harm could be redefined merely by limiting the amount of recovery for harm sustained. But if the state’s power to redefine legal rights is not limited by Locke’s view that the purpose of legislation is to render rights more secure, then since enactment of the Magna Carta, the rights of Englishmen and Americans have been illusory. Why limit the legislature’s power to infringe on life, liberty, and property if the legislature can infringe upon those rights

56. The origin of this provision is the Magna Carta, § 40: “To no one will we sell, to no one will we deny or delay right or justice.”


57. The position of this article is that the due process clause imposes a positive duty on the state to vindicate the rights of persons to their life, liberty and property by providing state remedies for the deprivation of such rights by other persons.

merely by redefining them? It would be logically absurd to grant constitutional access to courts of general jurisdiction and a jury determination of legal rights if at the same time the legislature could define those rights out of existence. A similar conundrum is whether the Washington legislature's decision to limit pain and suffering damages to $250,000.00 is a recharacterization of one's right to be free from bodily harm, or whether it is simply an adjustment of future legal rights. Analogizing to the real property example, a similar restriction on a landowner's right to enjoin a trespass or to bring an action for damages for trespass would strip the landowner of his property rights as effectively as requiring him to grant an easement to the public without just compensation.

Functionally, therefore, a limitation on damages or on injunctive relief may be as effective a way of restricting personal freedom as allowing a taking of property without due process or just compensation. The duty of the legislature to adopt and manage a civil justice system does not entitle the legislature to use its management power to deprive parties of remedies for invasion of their basic rights.

If a protected interest can be redefined by law, physical liberty could also be redefined to include, for example, a requirement that police permission be obtained prior to leaving one's house, neighborhood, city, or state. Such a substantive law would be equivalent to house arrest and would therefore

59. This situation would be as illogical as allowing a legislature to redefine a fee simple easement that provided unrestricted access to a public beach as was attempted in Nollan. The issue is complicated when the extension of liability is judicially imposed as it was in adopting strict liability, or by expanding liability by the elimination of privity. The redefinition of property rights is quite different from subjecting such rights to the police power. See, e.g., Lochner v. N.Y., 198 U.S. 45 (1905); The City of Seattle v. Ford, 144 Wash. 107, 257 P. 243 (1927); Mahoney v. Sailors' Union; 43 Wash. 2d 874, 264 P.2d 1095 (1953). The issue is not whether particular common law rights defining life, liberty, or property can be subject to regulation but whether such rights may be extinguished in favor of either other private persons or the public.

60. See Nollan, 107 S.Ct. 3141 (1987). There the Supreme Court held that the State of California could require payment or transfers of property by the owner to the public only when the development in question directly related to the cost of providing public services or when the development directly interfered with public benefits.

61. Thus, in Bivens, 403 U.S. 388 (1971), the Supreme Court decided that the injured party was entitled to a remedial action even though Congress had not established a statutory remedy. Blackstone states that taking private property for public purposes may be accomplished "[n]ot by absolutely stripping the subject of his property in an arbitrary manner, but by giving him full indemnification and equivalent for the injury thereby sustained." 2 W. BLACKSTONE, COMMENTARIES *139.
be subject to a habeas corpus petition. If such a statute were adopted, it would certainly infringe upon one's constitutional liberty. On a parity of reasoning, the state cannot use its authority to deny access to the courts so as to limit the rights of individuals to redress for injuries to their life, liberty, or property.

Confusion arises because public rights created by statute can be eliminated by statute. This principle has been upheld on both the state and federal level. On the state level, for example, in construing article I, section 3 of the Washington Constitution, the Supreme Court of Washington has held that a tort action can be brought only by virtue of a statute, that no vested right accrues therein, and that the legislature can revoke this right at any time. Moreover, even legal rights and property rights are subject to the legitimate exercise of the state's police power. On a national level, the distinction between public rights created by statute and traditional private rights known at common law is apparent when one compares Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n and Northern Pipe Line v. Marathon Pipe Line Co. In the former case, the Court upheld the statutory exclusion of the right to jury trial against a constitutional challenge because the issue involved public rights rather than liberty interests. In the latter case, a statute allowing article I judges to decide cases involving private law was declared unconstitutional because the statute attempted to change the kind of court that could deal with private rights under the sixth amendment. These cases hold that the legislature may create, limit, or annul new private causes of action in the exercise of its police power. But the police power does not entitle the legislature to destroy private rights as defined by common law or to transfer property from one person to another.

64. 430 U.S. 442 (1977).
68. Courts should recognize the distinction between the defining of natural or vested rights through the writ system and the creation of liability rules for the better
Thus, a legitimate exercise of the police power that limits private rights or the imposition of additional liability through a statutorily created cause of action must relate directly to a legislatively perceived evil or to a cost arising from the particular activity.69

The victims of tort actions do not in any way impose costs on the rest of society. Legislation that caps recovery for pain and suffering requires that persons who have been wrongfully injured give up the right to recover their losses from the ordering of society. The modification of the former at a minimum requires compensation if these rights are limited or eliminated, while the latter category can be modified at will by the legislature. As this article has pointed out, there is no real distinction between the right to fully enjoy Blackacre and the right to fully enjoy health or physical security. The mere fact that the action for recovery for infringement of one’s property is trespass and the action for recovery for physical injury is either trespass or trespass on the case should not be the basis for a different treatment when the legislature attempts to limit one’s recovery.

In The Road to Runnymede, Howard describes what has been protected historically:

Thus the Body of Liberties deals with such things as due process of law, general application of laws, the relationship of church and state, judicial procedures, and (in separate sections) “liberties” of freemen, women, children, servants, and foreigners. It resembled, to look backwards, the kinds of principles stated in Magna Carta, and, to look forward, it foreshadowed the bills of rights which were in the next century to become standard features of the American federal and state constitutions. Its resemblance to Magna Carta is striking. The Body of Liberties begins with the declaration that no man’s life, person, family, or property should be proceeded against or in “any way indamamaged under coulor of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country warranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any parteculer case by the word of god.” . . And it marks a link in one of the longest of jurisprudential chains, the concept of “due process,” or “law of the land,” which stretches at least from Magna Carta’s chapter 39 to the mandate of the Fifth Amendment of the United States Constitution that no person shall be deprived of “life, liberty, or property, without due process of law;” and the like provisions of the state constitutions. . . .

Other provisions of the Body of Liberties state principles drawn from Magna Carta. “No mans Cattel or goods,” says the 1641 document, shall be taken for public use “without such reasonable prices and hire as the ordinarie rates of the Countrie do afford”; if the cattle or goods suffer damage, “the owner shall be suffitiently recompenced.” Compare chapter 28 of the Magna Carta, which forbids the King’s officers to take “the corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment.” Again, both provisions, that of 1215 and that of 1641, lie in a tradition culminating in provisions of the federal and state constitutions, the requirement of just compensation for property taken for public use.

Howard, supra note 56, at 37-38 (footnotes omitted).

69. See supra note 60.
tortfeasor so that the insurance group that the tortfeasor belongs to will have lower rates. This transfer of assets between the victim and the insurance group, which includes the tortfeasor, violates the taking clause \(^{70}\) just as much as the ordinance in *Nollan* did when it required the granting of an easement for the public benefit without compensation. Whether the limitation is perceived as a constitutional denial of access to courts under the Magna Carta or a violation of due process under the fourteenth amendment, the limitation on recovery is unconstitutional. The purpose of the limitation is simply to make insurance coverage more accessible to the general run of businesses at the expense of the victims of wrongful acts.

In all cases of limiting a future right to contract or a future right to develop one's property, the imposition of a police regulation must be directly related to the possible harm of the contemplated action. For example, a restriction on the right to contract that requires disclosure of interest or finance charges relates directly to the public's costs of borrowing. Similarly, a restriction on the right to do business in a particular location must relate to the harm that would be imposed on the surrounding neighborhood.

By contrast, a cap on damages for pain and suffering arbitrarily affects certain individuals who are not engaged in any activity that would result in injuries to others. The need to reduce tort payments and thereby reduce insurance costs may be a legitimate aim of a public policy, but it is difficult to perceive why victims of intentional or negligent torts should be compelled to subsidize these lower rates. The solution to this problem lies in limiting damages where they have been inappropriately granted and prohibiting legislatures from arbitrarily appropriating victims' compensation to offset insurance premiums.

As we have pointed out, legislatures have not been the only agencies to create liability in order to carry out public purposes. By adopting strict liability and by eliminating the requirement of privity in product liability cases, the courts have extended liability beyond the definition of property rights developed through the writ system. Because these extensions of liability were justified for public policy reasons rather than to define legal or property rights, the amount and scope of

\(^{70}\) U.S. CONST. amend. V. & XIV. *See generally Nollan*, 107 S.Ct. 3141.
resulting damages is fully subject to legislative modification or repeal in the same manner as legislatively created rights. Thus, such public policy causes of action are similar to statutorily created causes of action and are fully subject to legislative modification.

Both public policy causes of action and statutory causes of action are distinct from the customary rights of action developed by the writ system because the former are created to deal with a public purpose while the latter were developed to define liberty and property. These latter rights and other constitutional rights granted by state and federal constitutions comprise the property protected by the Magna Carta and the life, liberty, and property described by John Locke.\textsuperscript{71} The government has a duty to protect these rights and they are subject only to appropriate police power regulations that enhance their general exercise. Under this approach, the Washington Tort Reform Act's limitation of damages to $250,000.00 for pain and suffering is clearly valid when applied to cases arising under strict liability, but is invalid as an unconstitutional taking when applied to cases arising from the intentional or negligent acts of a tortfeasor.

III. \textbf{\textsc{Summary and Conclusion}}

The question for courts faced with challenges to tort reform is whether to strike down the legislation as a destruction of private rights or to uphold the legislative response as a rational attempt to deal with an insurance crisis. As we have shown, the problem is compounded by the failure of the legislature to distinguish strict liability from negligence within the common law system of adjudication. Under our analysis, strict liability should be subject to legislative checks both in substance and process. On the other hand, legislation limiting non-economic damages in common law negligence and intentional tort actions or eliminating these actions through statutes of repose deny a citizen's basic rights for the benefit of insurance companies and the business community.

The judicial response to this confusion has varied. Courts that have struck down such legislation have assumed that legislatures may not destroy private rights and, therefore, must provide reasonable access to courts and juries for legitimate

\textsuperscript{71} See \textsc{supra} note 58.
damage claims. Other courts have upheld the restrictions on basic rights as long as the effect of the legislation was to further a legitimate public purpose. Courts in the latter cases have assumed that individual private rights can be sacrificed for the public good without finding that the state is guilty of an unjustified taking or of depriving a complainant of access to courts. As we have shown, courts that strike down such legislation are in some instances correct while courts upholding such legislation are in other instances equally correct. No solution to this apparent inconsistency can exist until the legal community first accepts the distinction between causes of action created for policy reasons and causes of action created to define private rights and then permits modification of the former and protects the integrity of the latter.

72. Lankford v. Sullivan, Long and Hagerty, Inc., 416 So. 2d 996 (Ala. 1982); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987); White v. State, 661 P.2d 1272 (Mont. 1983). Washington's Tort Reform Act was recently struck down as unconstitutional by Superior Court Judge Edward Heavy on the grounds that it denies equal protection under the United States and Washington Constitutions and also violates the right to jury trial. Carter v. Fibreboard Corp., No. 87203555-7 (order entered Feb. 19, 1988). The case was still pending in superior court at the time this article was published; presumably, the decision will be appealed.

A. Limiting recovery for noneconomic losses. See, e.g., ALASKA STAT. § 09.17.010 (1987) (noneconomic damages in medical malpractice actions limited to $500,000.00 except in cases of substantial impairment or disfigurement); COLO. REV. STAT. § 13-21-102.5(3)(a) (1987) (noneconomic damages limited to $250,000.00 unless court finds justification by clear and convincing evidence in which case damages limited to $500,000.00); FLA. STAT. ANN. § 768.80 (West Supp. 1988) (noneconomic damages limited to $450,000.00), contra Smith v. Dep't of Ins., 507 So. 2d 1080, 1088-89 (Fla. 1987) (holding damage cap unconstitutional as violating injured party's right of access to courts and right to trial by jury); HAW. REV. STAT. § 663-8.7 (Supp. 1987) (damages for pain and suffering limited to $375,000.00); KAN. STAT. ANN. § 60-3407 (Supp. 1987) (noneconomic damages limited to $250,000.00); ME. REV. STAT. ANN. tit. 28-A, § 2509 (Supp. 1987) (actions for damages due to negligent service of liquor limited to $250,000.00); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (Supp. 1987) (noneconomic damages limited to $350,000.00); MASS. GEN. LAWS ANN. ch. 231, § 60H (West Supp. 1987) (damages in medical malpractice actions limited to $500,000.00 except in cases of substantial impairment or disfigurement); MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1987) (noneconomic damages in medical malpractice actions limited to $225,000.00 unless noted exceptions exist); MINN. STAT. ANN. § 549.23 (West Supp. 1988) (intangible damages limited to $400,000.00 except for pain, disability or disfigurement); MO. ANN. STAT. § 538.210 (Vernon Supp. 1988) (noneconomic damages in medical malpractice actions limited to $350,000.00); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1987) (noneconomic damages limited to $875,000.00); S.D. CODIFIED LAWS ANN. § 21-3-11 (1987) (total damage in medical malpractice actions limited to $1,000,000.00); UTAH CODE ANN. § 78-14-7.1 (Supp. 1986) (noneconomic damages in medical malpractice actions limited to $250,000.00); WASH. REV. CODE § 4.56.250 (1987) (noneconomic damages limited to an amount of 0.43 multiplied by average annual wage and life expectancy of injured party); W. VA. CODE § 55-7B-8 (Supp. 1987) (noneconomic damages in medical malprac-
tice actions limited to $1,000,000.00); WIS. STAT. ANN. § 893.55 (West Supp. 1987) (noneconomic damages in medical malpractice actions limited to $1,000,000.00).

B. Statutes of repose that create an absolute time limit in which to bring an action after exposure to a negligent act, even when the injured party has had no notice of the injury during that time period. See, e.g., CAL. CIV. PROC. CODE § 337.15 (1982) (10 year statute of limitation on injuries arising out of latent deficiencies in developing and improving real property); MASS. ANN. LAWS ch. 260, § 2B (Law. Co-op. Supp. 1987) (3 year statute of limitation on injuries arising out of deficiencies or neglect in designing, planning, or constructing improvements to real property); MISS. CODE ANN. § 15-1-41 (Supp. 1987) (6 year statute of limitation on injuries arising out of deficiencies in designing, planning, or constructing improvements to real property); NEV. REV. STAT. § 11.205 (1983) (6 year statute of limitation on injuries arising out of deficiencies in designing, planning, or constructing improvements to real property).

C. Elimination of strict product liability for manufactured products sold in interstate commerce. See, e.g., 11 B. TROLLEN, STATE LEGISLATIVE REPORT CONTROLLING LIABILITY INSURANCE CRISIS: STATE ACTIONS AND FUTURE INITIATIVES IN THE AREA OF CIVIL JUSTICE REFORM (No. 1 1986). Two federal bills were introduced in 1985: S.B. 100, introduced by Senator Bob Kasten of Wisconsin, requires proof of negligence on the part of the manufacturer and provides for a two-year statute of limitation; amendment to S.B. 44, introduced by Senators Christopher Dodd of Connecticut and Slade Gorton of Washington, does not require proof of negligence but allows for a speeded-up claims process. Id.

D. Elimination of joint and several liability among tortfeasors. See, e.g., COLO. REV. STAT. § 13-21-111.5 (1987) (no defendant is liable for an amount greater than that defendant's degree of fault); FLA. STAT. ANN. § 768.81 (West Supp. 1988) (a party is liable based on degree of fault and not on basis of joint and several liability); HAW. REV. STAT. § 663-12 (Supp. 1987) (relative degree of fault of joint tortfeasors is considered in determining liability); UTAH CODE ANN. § 78-27-38 (Supp. 1986) (no defendant is liable for any amount in excess of that defendant's propor-
tion of fault); WYO. STAT. § 1-1-109 (Supp. 1987) (liability is based on individual defendant's percentage of fault).

E. In actions against health professionals, a requirement that claims be submitted to a medical panel for screening or arbitration before filing in court. See, e.g., ARIZ. REV. STAT. ANN. § 12-567 (West Supp. 1987) (medical malpractice actions shall be referred to medical liability review panel upon filing of action); IND. CODE ANN. § 16-9.5-9-2 (Burns Supp. 1987) (no action against health care providers may be commenced in court until presented to medical review panel unless all defendants agree otherwise); VA. CODE ANN. § 8.01-581.2 (Supp. 1987) (either party may call for review by medical malpractice panel and no court action may be brought within panel's period of review); VT. CODE ANN. tit. 27, § 166i (Supp. 1985) (no action against health care providers allowed until reviewed by a medical malpractice committee); WIS. STAT. ANN. § 655.04 (West 1980) (repealed 1986).

F. Additional notice of intent-to-sue requirements relating to public facilities. See, e.g., 42 PA. CONST. STAT. ANN. § 5522 (Purdon Supp. 1987) (requiring notice of intent to sue within six months of injury); OKLA. STAT. ANN. tit. 47, § 156 (West 1988) (failure to provide notice of claim within 90 days after injury results in 10% reduction of claim).

G. Limiting the attorney fees that may be paid to the plaintiff's attorney. See, e.g., ARIZ. REV. STAT. ANN. § 12-568 (West 1982) (at request of any party in health care actions, the court shall determine reasonableness of each party's attorneys' fees); CAL. BUS. & PROF. CODE § 6146 (West Supp. 1988) (in medical malpractice actions, attorneys' fees are limited to: (1) 40% of first $50,000.00; (2) 33 1/3% of next $50,000.00; (3) 25% of next $500,000.00; (4) 15% of any amount in which recovery exceeds $600,000.00); DEL. CODE ANN. tit. 18, § 6865 (Supp. 1986) (in medical malpractice actions, attorneys' fees may not exceed: (1) 35% of first $100,000.00; (2) 25% of next $100,000.00; (3) 10% of balance of any awarded damages); FLA. STAT. ANN. § 768.28 (West 1986) (in tort actions against the state, attorneys' fees limited to 25% of any judgment or settlement); IND. CODE ANN. § 16-9.5-5-1 (Burns 1983) (attorneys' fees from medical malpractice patient's compensation fund limited to 15% of any recovery from fund); IOWA CODE ANN. § 147.138 (West Supp. 1987) (in medical malpractice actions the
court shall determine reasonableness of any contingent fee arrangements); KAN. STAT. ANN. § 7-1216 (Supp. 1987) (attorneys' fees to be paid by any party in medical malpractice actions shall be approved by the judge); NEB. REV. STAT. § 44-2834 (1984) (on motion of any party in medical malpractice actions the court shall review attorneys' fees incurred by that party); N.Y. JUD. LAW § 474-A (McKinney Supp. 1988) (in medical malpractice actions, attorneys' fees are limited to: (1) 30% of first $250,000.00; (2) 25% of next $250,000.00; (3) 20% of next $500,000.00; (4) 15% of next $250,000.00; (5) 10% of any amount over $1,250,000.00); TENN. CODE ANN. § 29-26-120 (1980) (in medical malpractice actions, reasonable attorneys' contingent fees shall be determined by the court, not to exceed 1/3 of all damages).

H. Elimination of the collateral source benefits rule. See, e.g., ALASKA STAT. § 09.17.070 (Supp. 1987) (after fact finder has rendered award and the court has awarded costs and attorney's fees, defendant may introduce evidence of collateral source benefits); CONN. GEN. STAT. ANN. § 52-225(a) (West Supp. 1988) (in personal injury actions, the court shall receive evidence concerning collateral source benefits and make appropriate adjustments in amount of award before entering judgment); MINN. STAT. ANN. § 548.36 (West Supp. 1988) (in personal injury actions, the court shall reduce damage award by any amounts paid by statutorily defined collateral sources).