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1987]

## RETHINKING THE TORT LIABILITY SYSTEM: A REPORT FROM THE ABA ACTION COMMISSION

ROBERT B. MCKAY†

### I. INTRODUCTION

IT is a particular pleasure for me to come to Villanova Law School on this special occasion. To be allowed to participate in the present symposium on the tort liability system is something else and, in a way, more of an honor for me.

I have never been a student of the tort liability system. I do not—and would not be allowed to—teach the subject in my own law school. My ostensible qualification, as Chair of the American Bar Association Action Commission to Improve the Tort Liability System, does not signify knowledge of the subject. In truth, I was selected to head the Commission almost because of my lack of knowledge of the subject matter, with which the other thirteen Commission members were fully conversant. In short, a kind of neutral was needed to monitor the discussions in the search for illumination on this controversial topic. It became the task of those others to educate me to their various viewpoints. And educate me they did. Although I am still no scholar of the subject, I now at least know the vocabulary. I come to you with firm conviction in support of the propositions approved by the Commission, and am willing to defend even the somewhat amended version approved by the ABA House of Delegates on February 17, 1987.<sup>1</sup>

### II. THE ANTECEDENTS OF THE “TORT LIABILITY INSURANCE CRISIS”

In recent decades the property/casualty portions of the insurance industry have engaged in more or less violent cyclical swings of boom and bust, profitability and loss.<sup>2</sup> For example, in

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1. See A.B.A., *Report of the American Bar Association Action Commission to Improve the Tort Liability System* (1987) [hereinafter *ABA Tort Liability System*].

2. See NATIONAL CONFERENCE OF STATE LEGISLATURES, SUMMARY OF SELECTIVE STATE LEGISLATIVE ACTION: AFFORDABILITY AND AVAILABILITY OF LIABILITY INSURANCE (August, 1986); see also *ABA Tort Liability System*, *supra* note 1, at 7 n.13; INSURING OUR FUTURE: REPORT OF THE (NEW YORK) GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE 8 (1986).

the medical malpractice “crisis” of the mid-1970s, the insurance companies were receiving low returns on their investments while payments for medical malpractice claims were increasing rapidly. Accordingly, and not surprisingly, the companies raised their rates dramatically, prompting startled protests from the health care services, particularly medical doctors. As a result of the complaints of the powerful medical profession, many states adopted legislation designed to reduce the recoveries and thus to influence a downturn in rates.<sup>3</sup> Much of the legislation was ill-conceived, or at least did not perform as intended. But the “crisis” subsided, probably for two reasons. Most important was the fact that in the late 1970s and early 1980s interest rates began their dramatic climb, which permitted the insurance carriers to recoup their liability payouts with income from their investments of premium income.<sup>4</sup> Accordingly, further rate increases became unnecessary, and even some reductions were possible. Secondly, even where rates were not reduced to their former low levels, doctors adjusted to the higher rates as a cost of business that was comfortably passed on to their patients.

In the early 1980s, with interest rates at the highest level in memory, insurance companies prospered, and to some extent the favorable income statistics were passed on to customers in rates that did not reflect the cost of risk insurance, but were unrealistically low because of the hugely favorable investment climate.

This more or less euphoric state of affairs, momentarily favorable to insurers and insureds (however unfortunate for the economy as a whole) was not destined to last. As the economy more or less righted itself and interest rates declined to less than 10 percent, the property/casualty insurance industry began to suffer losses, sometimes severe, for two reasons. The artificially low rates that had been offered to attract premiums to be invested for high returns, now provided insufficient investment income to meet actuarially predictable losses. Moreover, about the same

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3. Statement of Johnny C. Finch, Senior Associate Director, General Government Division, GAO, before House of Representatives, Committee on Ways and Means, Subcommittee on Oversight on April 28, 1986. *See also* Business Insurance, Sept. 1, 1986, at 1 (indicating that aggregate operating income of 24 surveyed property/casualty insurers rose by 216.2% for first six months of 1986 as compared to same period in 1985).

4. *See* INSTITUTE FOR CIVIL JUSTICE, AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS, APRIL 1980-MARCH 1986 3-4 (Rand 1986). Although the studies in the aggregate cast doubt on the existence of a tort “litigation explosion,” there is reason to believe that substantial recent growth has occurred in the size of tort recoveries at the upper end of the compensation continuum. *Id.*

time, the cost of jury verdicts and settlements began to rise, perhaps not so much in terms of median awards, but the occasional extraordinarily large (by earlier standards) awards which were advanced as justification for substantial rate increases.<sup>5</sup>

Whatever the reason, the undisputed fact is that the cost of insurance increased dramatically,<sup>6</sup> from at least 1984 through 1986. Those most affected were the health professionals (again), lawyers (with rates that increased sometimes more than 1000 percent), accountants, engineers, municipalities (and their high school athletic teams, ice-skating rinks, and other citizen-desired services), and a vast array of other activities considered to involve high risk of tort recovery. The sharp escalation of rates, across the board, sometimes in staggering amount, was accompanied by the total demise of insurance in some "high risk" occupations.<sup>7</sup> Thus came the twin aspects of what was popularly known as the "insurance crisis," consisting of "unaffordability" and "unavailability."

However exaggerated may have been some assertions of unreasonableness in the sudden increase in rates, it is at least clear that insureds had been lulled into a false sense of economy as to the true cost of insurance and were thus ill-prepared for the dramatic, perhaps unreasonable increases. What is difficult to determine is the extent to which the earlier rates were "too low" and the extent to which the increases pushed them "too high." Insurance companies have never been notably forthcoming with their official records or statements of profitability.<sup>8</sup> However scanty the records, this much at least seems supportable: the insurance industry (especially the property/casualty branch) had some bad years between 1983 and 1985, but did much better, perhaps spectacularly so, from 1985 to 1987.<sup>9</sup>

### III. THE ROLE OF THE AMERICAN BAR ASSOCIATION

The American Bar Association is ordinarily not reluctant to

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5. For a more extensive discussion of the historical circumstances surrounding the insurance crisis, see generally *ABA Tort Liability System*, *supra* note 1, at 1-8.

6. See *ABA Tort Liability System*, *supra* note 1, at 8 (discussing large increase in premiums).

7. See *id.* at 3. Service providers such as doctors and day care centers, manufacturers of variety of products, and municipalities engaged in traditional public functions have had to confront the problem of unavailable insurance. *Id.*

8. See *id.* at 7-8.

9. *Id.* at 1-8.

enter the public forum in defense of, or in opposition to, positions or proposals that it believes are within its broadly interpreted mandate of concern for the public interest.<sup>10</sup> This is particularly true, and justifiably so, as to issues considered likely to have an impact on lawyers. The ABA has not hesitated to adopt positions on antitrust matters, criminal justice issues, international affairs, nominations to the federal judiciary and ethical codes for lawyers and judges.<sup>11</sup> One wonders, then, why should the ABA not take positions on product liability and other tort law issues, malpractice insurance, and indeed the whole system of liability insurance? It is strange that before 1987 the ABA had no reasoned position on the various aspects of the tort liability system and its insurance analog. That is nonetheless the surprising fact.

In 1981 and 1983 the ABA made a feeble stab at the issue, but came up with nothing more startling than general opposition to federal legislation in the field of product liability.<sup>12</sup> Clearly, this was insufficient. The principal action had been, and continued to be, in the state legislatures,<sup>13</sup> where the ABA was reduced to silence. With the advantage of hindsight, this incapacity becomes more understandable. As I have good reason to know, there are strong pressures within the ABA that mobilize against any action on this controversial set of issues. Those who favor action would move in various, perhaps conflicting directions, while others prefer to leave the matter to the slower process of common law development. The resulting consensus has favored inaction.

In a cautious move to break this impasse, in 1980, the ABA commissioned a study of the entire question, chaired by former Attorney General Griffin B. Bell.<sup>14</sup> The report, *Towards a Jurispru-*

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10. This concern for the public interest is evident throughout the ABA CODE OF PROFESSIONAL RESPONSIBILITY as well as other ABA publications that are in the public interest, such as the *Legal Education Newsletter*, which seeks to further lawyer competency, and *Alternatives*, which examines the availability of legal services available to the public as a whole. See also ABA CONSTITUTION, art. 1, reprinted in, 5 *American Bar Journal* 510 (1919) (setting out several objectives of ABA, including: "promot[ing] the administration of justice and . . . uphold[ing] the honor of the profession of the law.").

11. These positions can be found in various ABA publications such as: ANTI-TRUST, CRIMINAL JUSTICE, INTERNATIONAL LAW NEWS AND THE ABA CODE OF PROFESSIONAL RESPONSIBILITY.

12. See *ABA Tort Liability*, *supra* note 1, at ix.

13. See generally NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 2.

14. Other members of the Committee were Walter H. Beckham, Jr.,

*dence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, was released in 1984. That report, whose principal author was Professor Marshall Shapo of Northwestern Law School, carefully identified the issues and the alternative choices, but did not make any specific recommendations suitable to the ABA decision-making process.<sup>15</sup>

In the spring of 1985, a conference was assembled in Lexington, Kentucky, to review the report and recommend further steps to the ABA. The unsurprising result was the recommendation for yet another study group, but this time to make "action" recommendations. The true surprise was that I was later asked to chair the resulting body. That was, however, the determination of then ABA President William Falsgraf.<sup>16</sup> To my own astonishment, I agreed—and have never been sorry. As already noted, the experience was, for me, educational. Beyond that, and more important, it was an opportunity for me to become acquainted with, and to become friends with lawyers who lived in a world previously unknown to me. The experience was enlightening, exhilarating and ultimately (I believe) useful.

#### IV. THE ACTION COMMISSION AT WORK

The November, 1985 charge to the Action Commission<sup>17</sup> was

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Bernard M. Borish, Philip H. Corboy, Donald M. Haskell, Weyman T. Lundquist, and Richard F. Suhrheinrich.

15. See *ABA Tort Liability System*, *supra* note 1, at 1. This remains the most important previous statement on behalf of the ABA about the American tort liability system. Although few specific recommendations were made, the report did recognize several topics which merited further attention. *Id.*; see also *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, 13-1 (1984). Many of these recommended topics, such as punitive damages, pain and suffering, and injury prevention received further discussion in the *ABA Tort Liability System*.

16. At our initial press conference in New York City I referred to him as William Falsgraf. In justification, I can only recall that Falsgraf is the name by which the most famous tort law case is known. Even I knew that.

17. The Commission membership was well chosen to include knowledgeable individuals with a good variety of views and experience that could be brought to bear on questions of the tort liability system we were asked to investigate. Here are the names and brief identifications: Shirley S. Abrahamson—Justice of the Wisconsin Supreme Court since 1976; Guido Calabresi—Dean of the Yale Law School, New Haven, Connecticut; Jim R. Carrigan—Judge of the United States District Court for the District of Colorado; Thomas S. Chittenden—Senior Vice President and General Counsel of Citicorp Insurance Group in New York City; Leonard Decof—Attorney from Providence, Rhode Island; Don M. Jackson—Attorney from Phoenix, Arizona; Elaine Ruth Jones—Attorney for the NAACP Legal Defense and Educational Fund, Inc. in Washington D.C.; Thomas Lambert—Distinguished Professor at Suffolk University Law School in Boston; Robert B. McKay—Professor of Law at New York University,

as follows:

1. Consider recommendations for improving methods and procedures for compensating persons injured as the result of the tortious conduct of other persons;
2. Recommend means of implementing at the earliest possible date those improvements that the Commission finds to be most desirable or necessary to serve the best interests of the public;
3. Recommend any further studies or actions by the American Bar Association that the Commission deems necessary or appropriate to improve methods and procedures for compensating persons injured as the result of the tortious conduct of other persons.<sup>18</sup>

The Commission was asked to report within about a year, specifically in time for the report to be distributed to members of the House of Delegates, chairs of divisions, sections and committees, and to other interested persons, to permit debate on the recommendations at the February 1987 midwinter meeting of the ABA House of Delegates. We met that timetable, and the report was distributed in early January. As a presage of things to come, opponents of change immediately complained that there was insufficient time to study the document. As we were soon to learn, those who are unsure about defeating a proposal on the merits will inevitably support delay. Others, apparently the majority, be-

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Chair of the Commission; Stephen B. Middlebrook—Vice President and General Counsel of Aetna Life and Casualty Company in Hartford, Connecticut; Henry G. Miller—Attorney from White Plains, New York, Past President of the New York State Bar Association; Alan B. Morrison—Director of the Public Citizen Litigation Group in Washington, D.C.; Jon O. Newman—Judge, United States Court of Appeals for the Second Circuit; John T. Subak—Group Vice President and General Counsel for Rohm and Haas Company in Philadelphia. Jane Barrett, a Los Angeles attorney, was for some months a member of the Commission. Her counsel, too, was helpful.

This recitation of members would be incomplete without reference to the Commission Reporter, Professor Robert Rabin of the Stanford Law School. He brought to the work of the Commission expertise, skills of written and oral articulation, willingness to work hard, and grace under pressure. Most important of all, he prevented us from doing anything foolish while never seeking to inject his own, possibly different, views into the joint effort.

Special thanks are also due Carolyn Taylor, the staff director of the Tort and Insurance Practice Section (TIPS), who successfully steered the Commission through the bureaucratic mysteries of the ABA.

For a fuller description of the Commission membership's qualifications, see *ABA Tort Liability System*, *supra* note 1, Appendix E.

18. See *ABA Tort Liability System*, *supra* note 1, at 1.

lieved that the time had come (and indeed passed) when the ABA should take a stand one way or the other on issues that had for at least two years been extensively debated in state legislatures and, to a lesser extent, in Congress. No longer was it acceptable for the principal lawyer organization in the nation to sit out the debate on a subject of vital concern to the law and to lawyers with what in effect amounted to a “no comment.”

My one regret is that, shortly after the final meeting of the Commission in December 1986, four members concluded that they could not join the Report.<sup>19</sup> Their principal expressed dissatisfaction was the failure of the Report to grapple with related issues involving the insurance liability system.<sup>20</sup> But the Commission had decided early in its deliberations that it lacked the time, resources, and specialized knowledge essential to the additional task.<sup>21</sup> The assigned responsibility was to consider ways in which the legal profession could put its own house in order, regardless of charges of neglect or wrongdoing that could be laid at other doors.

#### A. *The Deliberative Process*

By the time the Report was released, it was apparent that the forces of opposition, already mobilizing their allies, could develop powerful coalitions to defeat, or at least delay consideration. The Commission, however, was not without its own supporters. The original sponsor of the idea of an Action Commission, and the principal financier of the endeavor, was the Torts and Insurance Practice Section (“TIPS”). The governing body of that section, the Council, is composed of individuals of widely varied interests, practice and views. Undoubtedly, some favored no change in the tort liability system, while others may have preferred more sweeping changes than the Commission’s rather modest proposals. Nearly all were united on the proposition that the ABA could no longer remain silent; speak it must if only to say that all is well. Accordingly, the TIPS Council initiated dis-

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19. The four dissenters were Hon. Jim R. Carrigan, Leonard Decof, Elaine R. Jones, and Thomas Lambert. *See id.* at xi.

20. The Report recommended that a major study be conducted on the insurance liability system. *See id.* at xi. As recommended by the Action Commission, a new commission to study the insurance liability system was appointed by President Eugene Thomas in June 1987.

21. *See id.* at 7. Although the Action Commission stressed the importance of a thorough review of changes to be made in the present insurance system, the Commission concluded that its members lacked the capacity to make such a review.



cussions with other sections, principally the Litigation Section and the Corporation, Banking and Business Law Section of the ABA. During January 1987 and early February, until the very beginning of the House of Delegates debate on February 17, there were extensive and intensive discussions in Palm Beach, Florida, Snowmass, Colorado, Washington, D.C., New York City, Chicago, and finally in New Orleans, the site of the midwinter meeting of the ABA. In addition, there were innumerable one-on-one telephone calls and multi-party conference calls.

The effort paid off. Although it was not possible to negotiate complete agreement among the Commission and the three sections, we were able to come into the February meeting with suggested amendments to four of the twenty-one recommendations that were agreed to by two or more of our negotiating components. Some of the suggested changes were clarifications, while others were seen by the Commission as substantive improvements. Still others, however, were rejected by some or a majority of the Commission as retreats from carefully formulated Commission positions.

Ultimately, this precarious coalition prevailed, with the Commission losing only one issue on which a majority had not accepted the modified language. And one amendment was accepted on the floor for further clarification of language that troubled delegates from the important states of California and Florida.

To report ultimate success without more, is, however, to miss the flavor of the contest. The day before the scheduled debate there was a motion to delay consideration of the Report until the annual meeting in San Francisco in August, ostensibly to permit further study. Although that motion was defeated, a similar motion had to be put down on February 17, the day of scheduled debate. Other procedural efforts to deflect consideration of the merits continued as a major tactic of the opponents,<sup>22</sup> particularly as they sensed growing support for the substance of the recommendations.

When debate at last turned to the recommendations, which were presented in clusters of related subject matter, the opposition surfaced its deeply felt objections to the Report, essentially

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22. For example, a motion was made to approve Recommendation One calling for a major study of the insurance liability system and to defer consideration of all other recommendations until that study was completed. The motion was rejected after vigorous debate.

in two respects. First, as previously reported in connection with the views of the dissenters within the Commission, there had been no significant study of the insurance liability system, which many lawyers, particularly plaintiffs' lawyers, blame for whatever problems may have arisen within the system.<sup>23</sup> Second, many lawyers believe that the tort liability system can better work its way through any perceived problems with state courts than with the unpredictable assistance of state legislatures. The opposition was vehement and eloquent, particularly on the recommendations that sought modification of prevailing doctrine relating to noneconomic damages (pain and suffering damages and punitive damages); joint-and-several liability,<sup>24</sup> and attorneys' fees.

After five-and-a-half hours of debate, the entire package, with amendments previously agreed to by some or all of the principal negotiators, was adopted. Before identifying the substance of the recommendations, it may be appropriate to suggest reasons for victory when defeat or at least deferral was generally predicted even on the eve of debate. There were, I believe, five major factors that led to the favorable outcome.

*First.* The large measure of agreement reached among the Action Commission, TIPS, Litigation Section and Business, Banking and Corporation law provided a strong core of support (and effective speakers for the floor debate). The fact that sections with such diverse interests could agree on the need for prompt action was a signal to the entire House of Delegates that these recommendations were at least not irresponsible.

*Second.* The Board of Governors solidly recommended approval of 19 of the 21 recommendations, withholding judgment only on the two that were still being negotiated with the three cooperating sections. President Eugene Thomas spoke strongly on the floor in support of the package.

*Third.* By the time of the February debate, it was apparent to nearly all delegates that, while the debate could be postponed until San Francisco, the issues would neither go away nor change much in the interim. It must have occurred to some delegates that there might be other, conceivably more interesting things to do in San Francisco than to debate the same issues there again.

*Fourth.* As previously reported, the Action Commission rec-

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23. See *ABA Tort Liability System*, *supra* note 1, at xi.

24. One widely respected veteran of the House of Delegates referred to the proposed modification of the joint-and-several-liability rule as the "worst" he had ever heard proposed on the floor of the House.

ommendations were deliberately structured as a kind of package. That is, every part was integral to every other part. It is not necessary to describe the result as a series of compromises to observe that, in a group as diverse as the members of the Action Commission, no individual could hope to secure endorsement of the entire program that he or she favored. Thus, it was inevitable—and I believe desirable—that all members should listen to each other, reason with each other, and reach a common position on controverted matters. Finally, when ten members accepted this notion of a package acceptable to all (only four dissenting), the theme of each subsequent presentation, to cooperating sections, to the Board of Governors, and in floor debate, was that the package should not be broken. To delete or to alter substantially any one section would jeopardize the whole with the risk of unraveling a carefully structured proposal.

*Fifth.* It may be that the opposition tactics were ill-conceived. The relentless resort to procedural devices to block consideration on the merits may have provoked an adverse reaction, a feeling that there was a concerted effort to prevent discussion of the merits. And, finally, the strident tone of opposition may have come across as too doomsday an approach to recommendations that all could see were modest, and some would say embarrassingly so.

#### B. *Some Preliminary Thoughts on the Commission Report*<sup>25</sup>

Before reviewing the recommendations of the Action Commission, and as amended by the House of Delegates, three preliminary observations are appropriate.

*First.* The most important thing to be said about the Report and its recommendations is that the entire thrust is in reaffirmation of the American tort liability system. The premise of individual fault, as modified by court-developed rules of strict liability in selected areas,<sup>26</sup> is fully preserved. No substantive principle of tort law is rejected, and proposed modifications remain entirely within the purpose and sense of prevailing law. Generally, traditional concepts in tort law are left undisturbed, save for minor

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25. To understand fully how these recommendations fit into the existing tort liability system in the United States, reference should be made to the text of the Report, in which each recommendation (in its original form) is placed in the context of the Report as a whole with additional comments on its potential impact on the tort liability system.

26. See RESTATEMENT (SECOND) OF TORTS §§ 507, 519 and 402A (1977) (setting forth special rules for “dangerous animals,” “abnormally dangerous activities” and product liability, respectively).

modifications.<sup>27</sup> No suggestion will be found of social insurance, additions to strict liability rules, or no-fault provisions.

*Second.* The recommendations, viewed individually or collectively, are modest. The idea, consistent with the charge to the Action Commission, is to improve the tort liability system—not to remake it in a different mold. Some will criticize the recommendations for lack of boldness and challenge to the existing system. Our aim was less far-reaching. Our objective was simply to improve that which we believe is not basically flawed.

*Third.* Only after the Action Commission completed its recommendations and published the Report did I realize (with the assistance of the Commission Reporter, Robert Rabin) something quite unique about the Report. While we set out to make proposals for improvement of the tort liability system—and certainly we did, as our critics will testify, the Action Commission also did something more.

The “something more” should be apparent to any thoughtful observer who reads the recommendations without an awareness of the assigned task and the background of the preparatory effort. A significant, if not altogether consciously intended byproduct of the recommendations taken as a whole is their focus on judicial management.<sup>28</sup> As will be evident when the recommendations are summarized below, many of the ideas about trial efficiency and devices to reduce cost and delay are not new,<sup>29</sup> but remain largely unimplemented in practice. The perhaps more novel recommendations relating to rules of the tort liability system also involve process, calling upon judges to employ remittitur to protect against excessive jury verdicts, to ensure that standards for application of punitive damages are rigorously enforced, and to protect clients against attorney overreaching by way of excessive fees. On reflection, it seems altogether appropriate that, in a common law world, in which judges are the principal actors, judicial management should be a principal theme of a report con-

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27. See, e.g., *ABA Tort Liability System*, *supra* note 1, at 18, (recommendation 5(b) retains concept of punitive damages but advises that there should be higher standard of proof in awarding of those damages).

28. See *id.* at 19, 34 (recommendation 5(c)(i) calls for appropriate pre-trial procedures to be utilized in order to weed out frivolous claims for punitive damages prior to trial and recommendation 13 calls for “fast track” system to streamline litigation in tort cases).

29. See, e.g., *id.* at 33 (recommendation 12 condemns dilatory tactics such as frivolous and harassing discovery). The same intent can be found in the Federal Rules of Civil Procedure which seek to limit unreasonable discovery. FED. R. CIV. P. 26(b).

cerned with improving the essentially common law domain of the tort liability system.

## V. THE RECOMMENDATIONS

### A. *Recommendations for Further Study*

The Action Commission made two principal recommendations for the establishment of new commissions to study particular problems related to the tort liability system, which were beyond the scope and capacity of the Action Commission. Recommendation One urges the ABA to establish a commission "to study and recommend ways to improve the liability insurance system as it affects the tort system." Recommendation 20 urges formation of a commission to study the mass tort problem and offer "a set of concrete proposals for dealing in a fair and efficient manner with these cases." Both Commissions have since been established.

### B. *Recommendations Relating to Principles of Tort Law*

#### *Pain and Suffering Damages*

Recommendations 2-4 relate to pain and suffering damages. Rejecting the arguments in favor of ceilings on pain and suffering damages, the Commission instead calls upon the courts to make greater use of remittitur and additur in modification of excessive or inadequate awards. In addition, in an effort to secure better information about tort awards than is currently available, "tort award commissions" are recommended to review tort awards and "suggest guidelines for future trial court reference." Further, ABA entities are encouraged to explore "whether additional guidance can or should be given to the jury on the range of damages to be awarded for pain and suffering in a particular case."

#### *Punitive Damages*

Recommendation 5, relating to punitive damages, supports the continued award of those damages in "appropriate cases," but urges narrowing the scope of punitive damages in five ways:

i. The standard of proof for the award of punitive damages should be tightened to limit such awards to "cases warranting special sanctions and should not be commonplace."<sup>30</sup>

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30. See *Feld v. Merrian*, 506 Pa. 383, 395, 485 A.2d 742, 747 (1984) where the Pennsylvania Supreme Court adopted the same standard set forth in the RESTATEMENT (SECOND) OF TORTS § 908(2) regarding the imposition of punitive

ii. Various suggestions to the courts are advanced as a means of judicial limitation of inappropriate or excessive awards.

iii. Appropriate safeguards “should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.”

iv. “Legislatures and courts should be sensitive to adopting appropriate safeguards to protect the master or principal from vicarious liability for the unauthorized acts of non-managerial servants or agents.”<sup>31</sup>

v. In carefully selected cases, courts should be authorized to award some portion of a punitive damages award to “public purposes,” always being mindful that the plaintiff and counsel are reasonably compensated for bringing the action and prosecuting the punitive damages claim.

#### *Joint-and-Several Liability*

Recommendation 6 on joint-and-several liability, although considerably more modest than changes previously enacted by some state legislatures, drew the most hostile response. The proposal was designed simply to recognize that, in the case of noneconomic damages, justice to the victim does not require full recovery against a defendant whose liability was “substantially disproportionate to the total injury.”

#### *Attorneys’ Fees*

Recommendations 7-9 deal with attorneys’ fees in three separate provisions:

a. “Fee arrangements with each party in tort cases should

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damages. Specifically, the *Feld* court stated, “[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.” *Id.* Further, the court noted that one must look to all the circumstances, including the motive of the wrongdoers and the relation between the parties. *Id.*; see also *ABA Tort Liability System*, *supra* note 1, at 17 (Commission observes that punitive damages are being awarded too frequently, especially in unintentional injury cases). The standard of proof recommended by the Report is “clear and convincing evidence.” *ABA Tort Liability System*, *supra* note 1, at 18.

31. See *W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS*, § 70, at 504 (5th ed. 1984). Many modern courts have held employees to be within the scope of employment even if they deviate from the normal course of employment for their own purposes so long as the deviation is “reasonably foreseeable.” *Id.*; see also *O’Boyle v. Avis Rent-A-Car*, 78 A.D.2d 431, 435 N.Y.S.2d 296 (N.Y. App. Div. 1981) (employer held liable for actions of underaged gas attendant who had taken car to lunch); *cf. Penn Central Transp. v. Reddick*, 398 A.2d 27 (D.C. 1979) (employer held not liable for servant’s attack on plaintiff which in no degree was committed for employer’s benefit).

be set forth in a written agreement that clearly identifies the basis on which the fee is to be calculated,” and the various ways of computing contingency fees should be clearly explained to prospective clients.

b. “Courts should discourage the practice of taking a percentage fee out of the gross amount of any judgment or settlement.” Fees should be calculated instead on the net amount of the recovery.

c. Courts should accept jurisdiction over complaints about excessive fees.<sup>32</sup>

### *Secrecy and Coercive Agreements*

Recommendations 10-12 set forth a series of provisions designed to protect against the harmful consequences sometimes resulting from secrecy and coercive agreements.

### *Streamlining the Litigation Process: Frivolous Claims and Unnecessary Delay*

Recommendations 13-18 are designed to limit the harmful consequences of frivolous claims and unnecessary delay, including the following:

- i. “A ‘fast track’ system should be adopted . . . .”
- ii. Courts should take steps “to adopt procedures for the control and limitation of the scope and duration of discovery . . . .”
- iii. Standards similar to those in Rule 11 of the Federal Rules of Civil Procedure should be adopted by the states.<sup>33</sup>

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32. The Pennsylvania Legislature has provided guidelines for the determination of a sufficient fee which provide as follows:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the case.
- (2) The customary charges of the members of the bar for similar services.
- (3) The amount involved in the controversy and the benefits resulting to the client or clients from the services.
- (4) The contingency or certainty of the compensation.

41 PA. STAT. ANN. § 503(b) (Purdon Supp. 1987); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17 (1984). This ethical consideration provides: “A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17 (1984).

33. *See* FED. R. CIV. P. 11. Rule 11 provides in pertinent part: Every pleading, motion and other paper of a party represented by an

iv. "Trial judges should carefully examine, on a case-by-case basis, whether liability and damage issues should be tried separately."<sup>34</sup>

v. "Non-unanimous jury verdicts should be permitted in tort cases, such as verdicts by five of six or ten of twelve jurors."<sup>35</sup>

vi. "Use of the various alternative dispute resolution mechanisms should be encouraged by federal and state legislatures, by federal and state courts, and by all parties . . . ."<sup>36</sup>

### *Injury Prevention and Reduction*

Recommendation 19 encourages tightening of discipline procedures and adequate support for disciplinary bodies in each state.

### *Concluding Recommendation*

Recommendation 21 invites discharge of the Action Commission after publication of the Report. This was the favorite recommendation of the Commission members—and perhaps of the House of Delegates as well. The recommendation was unanimously approved, along with a burst of applause, whether in self-congratulation or as an expression of relief that the ordeal by debate was now over.

## VI. CONCLUSION

### The Action Commission did what it was asked to do, and

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attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument . . . ."

*Id.*

34. *ABA Tort Liability System*, *supra* note 1, at 37, recommendation 16, comment a. The purpose of this recommendation is to achieve greater economy in tort cases. *Id.* In some cases, separation of the issues may be unwarranted because liability cannot be determined without a showing of damages. *Id.* But certain complex issues such as collateral source and punitive damages can be handled more efficiently through segmentation. *Id.*

35. See 42 PA. STAT. ANN. § 5104 (Purdon 1981). The statute provides that "In any civil case a verdict rendered by at least five-sixths of the jury shall be the verdict of the jury and shall have the same effect as a unanimous verdict of the jury." *Id.*

36. The most common forms of alternative dispute resolution include arbitration, mediation, negotiation, and mini-trials. *Id.*; see *ABA Tort Liability System*, *supra* note 1, Appendix D.



within the time limit prescribed. Whether it was well, or ill-done will be determined by others. Implementation or rejection depends upon legislatures, courts, lawyers and affected members of the public.