

## OHIO ENACTS TORT REFORM

Alan F. Berliner, Esq.  
614.469.3268

In a “lame duck” session in December 2004, the Ohio General Assembly enacted new tort reform laws. The legislation, Senate Bill 80, changed dozens of provisions in Ohio’s statutory tort laws and will have a major impact on tort cases in Ohio.<sup>1</sup> The major provisions of the general tort reform bill are summarized below. This article is not intended to provide legal advice and readers should, of course, review the actual bills that have been enacted. The bills are available on-line.<sup>2</sup>

In addition to these changes, the Ohio General Assembly previously passed several laws, including Senate Bill 281 and House Bill 215 amending many of Ohio’s medical malpractice liability statutes, which are applicable to causes of action accruing after April 11, 2003.<sup>3</sup> Medical liability claims are civil actions involving medical, dental, optometric, and chiropractic claims.<sup>4</sup> Although the medical liability reforms relate to many of the same subjects as to the general tort reform statutes, the changes in many instances are not equivalent, as will be pointed out below. Tort actions are defined to specifically exclude medical liability claims.<sup>5</sup>

It should be noted that many of these reforms were opposed by the Plaintiff’s trial bar and are likely to be challenged in court. Two significant challenges are expected. The first legal argument the Plaintiff’s trial bar is expected to make is that limitations on damages provisions are unconstitutional under Ohio law. There is precedence for this position in previous decisions of the Ohio Supreme Court.<sup>6</sup> However, the composition of the Ohio Supreme Court has changed over the last several years and the current Supreme Court is expected to be more favorable to business generally, and particularly, to tort reform. Fourteen states have held such caps are constitutional; nine states have struck down such caps based on equal protection, due process and right to trial by jury arguments.

Second, Ohio follows the single subject rule requirement, meaning that bills passed by the Ohio General Assembly are to deal with only one “subject.”<sup>7</sup> While this principle has been honored in the breach for decades, a recent decision of the Ohio Supreme Court is a strong indication that the court intends to enforce the rule, at least in the egregious cases, in the future.<sup>8</sup>

### LIMITATIONS ON COMPENSATORY DAMAGES

There continues to be no limit on the amount of compensatory damages for economic loss in tort cases.<sup>9</sup> However, effective April 6, 2005, the amount of compensatory damages that represent non-economic loss (pain and suffering etc.) may not exceed the greater of \$250,000 or three times the economic loss, to a maximum of \$350,000 for each plaintiff, or a maximum of \$500,000 for each occurrence.<sup>10</sup> The limitation in tort cases applies in the absence of “catastrophic injuries.”<sup>11</sup> As with medical liability claims, the new law requires a general verdict to be accompanied by answers to interrogatories specifying how much of the award was for economic loss and how much of the award was for non-economic loss.<sup>12</sup>

Catastrophic injuries include permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system or permanent physical functional injury that permanently prevents the injured person from being able to independently care for themselves and perform life-sustaining activities.<sup>13</sup> While there is no limitation on the amount of compensatory damages for non-economic loss for catastrophic injuries in general tort claims,<sup>14</sup> there is a cap on non-economic loss for catastrophic injuries in medical liability claims.<sup>15</sup> That limit is \$500,000.00 per plaintiff and \$1 million per occurrence.<sup>16</sup>

In determining an award of compensatory damages for non-economic loss in a tort action, the trier of fact may not consider evidence of the defendant’s alleged wrongdoing, misconduct, or guilt; evidence of the defendant’s wealth or financial resources; or any other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.<sup>17</sup> In the event a defendant challenges an award of compensatory damages for non-economic loss as excessive, upon motion, the court must conduct a review including, but not limited to, whether the evidence presented or the attorney’s arguments a) inflamed the passion of prejudice of the trier of fact, b) resulted in the improper consideration of the wealth

of the defendant or c) resulted in the improper consideration of the misconduct of the defendant so as to improperly punish the defendant or to circumvent other statutory limitations on punitive or exemplary damages.<sup>18</sup> The court is also to consider whether the verdict is in excess of verdicts involving comparable injuries to similarly situated plaintiffs and whether there were any extraordinary circumstances in the record to account for an award in excess of what was granted by courts to similarly situated plaintiffs.<sup>19</sup> There is no comparable provision affecting medical liability claims.

### **PUNITIVE DAMAGES**

Generally, under the new laws, punitive or exemplary damages may not exceed two times the amount of the compensatory damages.<sup>20</sup> If the defendant is a small employer or individual, the amount of punitive damages is further limited to the lesser of two times the compensatory damages, ten percent of the employer's or individual's net worth when the tort was committed, or \$350,000.00.<sup>21</sup> A small employer is defined as an employer who employs not more than 100 employees on a full-time permanent basis.<sup>22</sup> If the employer is classified as being in the manufacturing sector, a small employer is defined as an employer who employs not more than 500 employees on a full-time permanent basis.<sup>23</sup> Any attorneys fees awarded as a result of a claim for punitive damages may not be considered for the purposes of determining the cap on punitive damages.<sup>24</sup>

There are also a number of miscellaneous provisions regarding punitive damages. These include a) the prohibition on the imposition of multiple punitive damage awards where such an award has already been imposed for the same act or course of conduct; b) elimination of "oppression" and "insult" as a basis for award of punitive damages; and c) the prohibition of prejudgment interest on punitive damages.<sup>25</sup> However, unlimited punitive damage awards can be issued against a defendant where the defendant has acted with the required culpable mental state and has been convicted of or pled guilty to a felony where the culpable mental states of "purposefully" or "knowingly" are an element of the criminal offense.<sup>26</sup> The new law also expands the government standards defense to include manufacturers of over-the-counter drugs, medical devices and non-drug manufacturers.<sup>27</sup> The fraud exception to the government standards punitive damages defense applicable to FDA and over-the-counter drugs to non-drug manufacturers has also been expanded such that the government standards defense does not apply if the manufacturer or supplier fraudulently withheld from a government agency information known to be material and relevant to the alleged harm or misrepresented information of that type. There are no comparable provisions pertaining to medical liability claims.<sup>28</sup>

### **ATTORNEYS FEES**

Unlike medical liability claims where attorneys fees are subject to court approval if they exceed the applicable limits on compensatory damages for non-economic loss, Senate Bill 80 did not establish any restrictions on attorneys fees for general tort claims.

### **SUCCESSOR LIABILITY**

Ohio is one of the major states for asbestos-related claims, particularly northern Ohio. Included in the tort reform were limitations on the successor asbestos-related liabilities of certain corporations.<sup>29</sup> The cumulative successor asbestos-related liabilities of a corporation will be limited to either a) the fair market value of the acquired stock or assets of the transferor, as determined on the effective date of the stock or asset purchase if the corporation is a successor in a stock purchase or an asset purchase, or b) the fair market value of the total gross assets of the transferor, as determined on the effective date of the merger or consolidation, if the corporate is a successor in a merger or consolidation.<sup>30</sup> The term "successor asbestos-related liabilities" means any liability whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, if the liabilities are related in any way to asbestos claims and either of the following applies: 1) the liabilities are assumed or incurred by a successor as a result of or in connection with an asset purchase, stock purchase, merger, consolidation, or agreement providing for an asset purchase, stock purchase, merger, or consolidation, including a plan of merger, or 2) the liabilities were imposed by a court order on a successor.<sup>31</sup>

## COLLATERAL SOURCE

A defendant in a tort action will now be permitted, in some circumstances, to introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that occurred due to an injury, death or loss to personal property that is the subject of a claim.<sup>32</sup> However, such evidence is not permitted if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation (e.g., Department of Veterans Affairs, Medicare, Medicaid), a contractual right of subrogation or a statutory right of subrogation, or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or disability payment.<sup>33</sup> On the other hand, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the policy and the employer is a defendant in the action.<sup>34</sup>

Plaintiffs are permitted to introduce evidence of any amount the plaintiff has paid or contributed to secure any of the benefits that the defendant introduced into evidence.<sup>35</sup> These provisions mirror those applicable to medical liability claims except that the references to life insurance and disability payments are not included in the medical liability statutes.

## PRODUCT LIABILITY PROVISIONS

The consumer expectation test, which provided that a product was defective in design or formulation if it was more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, is eliminated as a stand-alone test for design defect causes of actions.<sup>36</sup> Instead, the consumer expectation test is integrated into the list of factors to be considered in determining the foreseeable risks associated with the design or formulation of a product in design defect causes of action.<sup>37</sup> At the same time, the no feasible alternative design or formulation defense for design defect causes of actions is strengthened by eliminating the unreasonableness exception.<sup>38</sup> Moreover, all common law product liability causes of action are abrogated by the statutory superceding of the holding of the Ohio Supreme Court in *Carrell v. Allied Products Corporation* (1997), 78 Ohio St. 3d 284, that the common law product liability cause of action of negligent design survives the enactment of the Ohio Product Liability Act.<sup>39</sup>

The new tort law establishes a 10-year statute of repose for product liability claims against manufacturers or suppliers of products.<sup>40</sup> In addition, a 10-year statute of repose is established for construction-related claims with the 10-year period beginning 10 years from the date of substantial completion of the project.<sup>41</sup>

Medical liability claims must be commenced within one year after the cause of action accrues.<sup>42</sup> Claimants may give written notice of the intended action to the opposing party prior to the expiration of that one-year period, thereby allowing the claimant to commence the action within 180 days after the notice is given.<sup>43</sup> The statute of repose for medical liability claims requires that such claims be commenced within four years of the occurrence.<sup>44</sup> However, if a person making such a claim could not have discovered the injury within three years after the act or omission constituting the claim, but does discover the injury before the four-year period, the person has one-year from the discovery to commence the action.<sup>45</sup> Another allowable extension occurs when the alleged act or omission involves a foreign object that has been left in the body of the claimant. In this circumstance, the person may commence an action not later than one year after the person discovered or should have discovered the foreign object.<sup>46</sup>

## SUBROGATION

A recent decision of the Ohio Supreme Court in *Northern Buckeye Education Council Group Health Benefits Plan v. Lawson* (2004), 103 Ohio St. 3d 188, regarding the subrogation rights of insurance companies has created much consternation. In *Lawson*, the court held that a provider of health insurance benefits and an insured who has been injured by an act of a third party may agree prior to payment of medical benefits that the insured will reimburse the insurer for any amounts later recovered from that third party, third party's insurer, or any other person through settlement or satisfaction of judgment upon any claims arising from the third party's act.<sup>47</sup> The court further held that such an agreement, if clear and unambiguous, is not unenforceable as against public policy, irrespective of whether the settlement or

judgment provides full compensation for the insured's total damages.<sup>48</sup> Additionally, the court held that a reimbursement agreement between an insured and a health benefits provider clearly and unambiguously avoids the make-whole doctrine if the agreement establishes both (1) that the insurer has a right to a full or partial recovery of amounts paid by it on the insured's behalf and (2) that the insurer will be accorded priority over the insured as to any funds recovered.<sup>49</sup>

Despite intense negotiations between representatives of the Plaintiff's trial bar and the insurance industry, no compromise was reached. Therefore, the Ohio General Assembly created the Ohio Subrogation Rights Committee (ORSC), which will consist of six voting members of the General Assembly with an additional seven non-voting members on the Committee. The purpose of the Committee is to investigate the problems caused by the court decision and to prepare a report of recommended legislative solutions in response to that court decision no later than September 1, 2005.<sup>50</sup>

## MISCELLANEOUS PROVISIONS

### **Seat Belt Use Evidence**

Evidence of non-use of a seat belt will be permitted to be introduced in tort actions for the purpose of reducing non-economic damage awards.<sup>51</sup>

### **Borrowing Statute**

The new law creates a "borrowing" statute, for purposes of a statute of limitations and bars a claimant from bringing a claim in Ohio if the claim would be time barred in the claimant's own state.<sup>52</sup>

### **Taxable Awards-Jury Instructions**

Jury instructions will now be permitted regarding the tax implications of compensatory and punitive damage awards.<sup>53</sup>

### **"Obesity" Provisions**

Immunity from civil damages is granted to manufacturers, sellers, trade associations and suppliers of food, drink, chewing gum and their components for claims resulting from a person's obesity or weight gain or any health condition related to obesity, weight gain or cumulative consumption.<sup>54</sup> "Cumulative consumption" means any health condition, including increased cholesterol, heart disease or high blood pressure that is caused by successive consumption of food, drink or chewing gum.<sup>55</sup>

### **Frivolous Conduct**

Ohio courts will now have statutory authority to, on their own initiative, impose sanctions for frivolous conduct.<sup>56</sup>

### **Legal Consumer's Bill of Rights**

The General Assembly inserted in the law a request to the Supreme Court of Ohio to adopt a rule prescribing a "Legal Consumer's Bill of Rights."<sup>57</sup> Attorneys would be required to append the Bill of Rights to every written retainer agreement or contract for legal services.<sup>58</sup> Senate Bill 80 provides model language for the document.

These changes in Ohio tort law will impact virtually every tort case in Ohio in the future. As these new statutes are applied in practice, the landscape for tort cases in Ohio will change dramatically. These "reforms" will add fuel to the continuing debate and will undoubtedly lead to further proposals for tort reform in Ohio.

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<sup>1</sup> Am.S.B. No. 80

<sup>2</sup> [www.legislature.state.oh.us](http://www.legislature.state.oh.us).

<sup>3</sup> Am.Sub. S.B. No. 281; Sub. H.B. 215.

<sup>4</sup> R.C. 2305.113(E).

<sup>5</sup> R.C. 2315.18(A).

<sup>6</sup> See *State v. Sheward* (1999), 86 Ohio St. 3d 451.

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- <sup>7</sup> Section 15(D), Article II, Ohio Constitution.
- <sup>8</sup> See *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St. 3d 122, 2004-Ohio-6363.
- <sup>9</sup> R.C. 2315.18(B)(1).
- <sup>10</sup> R.C. 2315.18(B)(2).
- <sup>11</sup> R.C. 2315.18(B)(3).
- <sup>12</sup> R.C. 2315.18(D).
- <sup>13</sup> R.C. 2315.18(B)(3).
- <sup>14</sup> *Id.*
- <sup>15</sup> R.C. 2323.43(A)(3).
- <sup>16</sup> *Id.*
- <sup>17</sup> R.C. 2315.18(C).
- <sup>18</sup> R.C. 2315.19(A)(1).
- <sup>19</sup> R.C. 2315.19(A)(2), (3).
- <sup>20</sup> R.C. 2315.21(D)(2)(a).
- <sup>21</sup> R.C. 2315.21(D)(2)(b).
- <sup>22</sup> R.C. 2315.21(A)(5).
- <sup>23</sup> *Id.*
- <sup>24</sup> R.C. 2315.21(D)(2)(c).
- <sup>25</sup> R.C. 2315.21(D)(3), (5), (E)(1).
- <sup>26</sup> R.C. 2315.21(D)(6).
- <sup>27</sup> R.C. 2307.80.
- <sup>28</sup> R.C. 2307.80(D)(2).
- <sup>29</sup> R.C. 2307.97.
- <sup>30</sup> R.C. 2307.97(C)(1).
- <sup>31</sup> R.C. 2307.97(A)(5)(a).
- <sup>32</sup> R.C. 2315.20(A).
- <sup>33</sup> *Id.*
- <sup>34</sup> *Id.*
- <sup>35</sup> R.C. 2315.20(B).
- <sup>36</sup> R.C. 2307.75.
- <sup>37</sup> R.C. 2307.75(B).
- <sup>38</sup> R.C. 2307.75(F).
- <sup>39</sup> Section 3(D), Am. Sub. S.B. 80.
- <sup>40</sup> R.C. 2305.10.
- <sup>41</sup> R.C. 2305.131.
- <sup>42</sup> R.C. 2305.113(A).
- <sup>43</sup> R.C. 2305.113(B)(1).
- <sup>44</sup> R.C. 2305.113(C)(1).
- <sup>45</sup> R.C. 2305.113(D)(1).
- <sup>46</sup> R.C. 2305.113 (D)(2).
- <sup>47</sup> *Northern Buckeye Education Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 192, 2004 Ohio 4886.
- <sup>48</sup> *Id.*
- <sup>49</sup> *Id.* at 194.
- <sup>50</sup> R.C. 2323.44.
- <sup>51</sup> R.C. 4513.263.
- <sup>52</sup> R.C. 2305.103.
- <sup>53</sup> R.C. 2315.01(B).
- <sup>54</sup> R.C. 2305.36(B).
- <sup>55</sup> R.C. 2305.36(A)(1).
- <sup>56</sup> R.C. 2323.51.
- <sup>57</sup> Section 4(B), Am. Sub. S.B. 80.
- <sup>58</sup> *Id.*