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THE PROSPECTS FOR TORT REFORM IN ARIZONA

Final Report

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16. Abstract

Currently, traditional methods of tort reform are not politically feasible in Arizona. One political leader in Arizona has stated; “Tort reform is unlikely to occur in Arizona.” However, if we are to consider tort reform in Arizona, the most politically feasible method may be to take small steps toward reform. Another important political leader in Arizona has said; “Incremental or more limited [tort] reforms must be pursued.” Tort reform may not be a dead issue, but Arizona does not currently have a strong or politically active spokesperson in favor of tort reform.

While this report does not see traditional tort reforms as likely to occur in the near future in Arizona, it is possible that other reforms that are not generally defined as tort reform may be politically feasible. For instance, damage caps, a traditional tort reform issue, is not likely to occur in Arizona, yet a reform of expert witness testimony or a restoration of one aspect of sovereign immunity may occur under favorable political circumstances. Thus, tort reform in incremental and a nontraditional manner may still be attempted in Arizona.

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APPROXIMATE CONVERSIONS TO SI UNITS

Symbol	When You Know	Multiply By	To Find	Symbol
		LENGTH		
in	inches	2.54	centimeters	cm
ft	feet	0.3048	meters	m
yd	yards	0.914	meters	m
mi	miles	1.61	kilometers	km
		AREA		
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mi^2	square miles	2.59	kilometers squared	km^2
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lb	pounds	0.454	kilograms	kg
T	short tons (2000 lb)	0.907	megagrams	Mg
		VOLUME		
fl oz	fluid ounces	29.57	milliliters	mL
gal	gallons	3.785	liters	L
ft^3	cubic feet	0.0328	meters cubed	m^3
yd^3	cubic yards	0.765	meters cubed	m^3

Note: Volumes greater than 1000 L shall be shown in m^3.

		TEMPERATURE (exact)		
°F	Fahrenheit temperature	5/9 (after subtracting 32)	Celsius temperature	°C

APPROXIMATE CONVERSIONS TO SI UNITS

Symbol	When You Know	Multiply By	To Find	Symbol
		LENGTH		
mm	millimeters	0.039	inches	in
m	meters	3.28	feet	ft
yd	meters	1.09	yards	yd
km	kilometers	0.621	miles	mi
		AREA		
mm^2	millimeters squared	0.0016	square inches	in^2
m^2	meters squared	10.764	square feet	ft^2
yd^2	kilometers squared	0.39	square miles	mi^2
ha	hectares (10,000 m^2)	2.53	acres	ac
		MASS (weight)		
g	grams	0.0353	ounces	oz
kg	kilograms	2.205	pounds	lb
Mg	megagrams (1000 kg)	1.103	short tons	T
		VOLUME		
mL	milliliters	0.034	fluid ounces	fl oz
L	liters	0.264	gallons	gal
m^3	meters cubed	35.315	cubic feet	ft^3
m^3	meters cubed	1.308	cubic yards	yd^3

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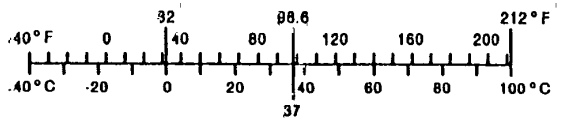

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EXECUTIVE SUMMARY

Two trends characterize the existing tort liability environment that public entities, like ADOT, encounter. First, states and their transportation related agencies are spending millions of dollars each year on liability settlements. More important, the amount of money required to cover the costs of tort suits has risen dramatically over the last two decades. In fact, Arizona's liability expenditures in the 1990s are four times what they were in the 1980s.

The second trend concerns the highly volatile nature of the current tort environment. At any point in time, a successful plaintiff can confront a public entity with a settlement worth millions of dollars. To say that the existing system represents a significant financial burden and exacts a toll on long term planning decisions is a gross understatement. In short, reform efforts that might bring a desirable level of predictability and reasonability to the tort process need further exploration.

In the last twenty-five years in Arizona, the judicial, legislative, and executive branches have attempted or effected significant tort reforms. In the 1960s, for example, the principal of sovereign of immunity was judicially abolished. This retraction, however, was later followed by a legislative reclaiming of certain exceptions to governmental liability. Arizona has also instituted a "pure" comparative negligence scheme where a plaintiff may recover damages even when they are more than 50% at fault. The abolition of joint and several liability complements the comparative negligence system. In this way, Arizona is a state where people pay and receive damages based solely upon their percentage of fault.

More recent attempts at tort reform in Arizona have been less successful. For example, the courts declared the statute of repose unconstitutional. Later, the sweeping Personal Injury Reform Act of 1993 was largely overturned by popular vote in the 1994 referendum.

In hindsight, it is quite possible that the Arizona legislature was too ambitious in 1993. Perhaps Arizona voters would have supported a more limited, less sweeping attempt at reform. One general act that radically revises the entire tort system may be desirable, but politically naive. Such a measure is bound to mobilize the well-endowed and well-organized legal interests (Arizona Trial Lawyers) that benefit from existing arrangements. In addition, aggressive reforms ensure that many voters will feel that at least one aspect of the effort conflicts with their own self-interest and/or their conception of what is just. Adversaries will, of course, be quick to recognize such strategic weaknesses and use them to mobilize opposition. Subsequently, tort reform in Arizona may necessarily involve patience and the incremental implementation of targeted measures.

Currently, traditional methods of tort reform are not politically feasible in Arizona. One political leader in Arizona has stated; “Tort reform is unlikely to occur in Arizona.” However, if we are to consider tort reform in Arizona, the most politically feasible method may be to take small steps toward reform. Another important political leader in Arizona has said; “Incremental or more limited [tort] reforms must be pursued.” Tort reform may not be a dead issue, but Arizona does not currently have a strong or politically active spokesperson in favor of tort reform.

While this report does not see traditional tort reforms as likely to occur in the near future in Arizona, it is possible that other reforms that are not generally defined as tort reform may be politically feasible. For instance, damage caps, a traditional tort reform issue, is not likely to occur in Arizona, yet a reform of expert witness testimony or a restoration of one aspect of sovereign immunity may occur under favorable political circumstances. Thus, tort reform in incremental and a nontraditional manner may still be attempted in Arizona.

INTRODUCTION

In recent years, the tort liability costs that transportation agencies in the United States are confronted with have risen dramatically. This research reflects the Arizona Department of Transportation's (ADOT) desire to better understand the types of legislative reforms that could be used to address their particular liability concerns.

This report begins by focusing on the liability problem confronting highway agencies in general and ADOT in particular. It examines the causes of the liability problem, including the erosion of sovereign immunity most states have recently experienced. In this first chapter, data is also presented that establishes the increasing financial burden that transportation entities endure due to liability litigation.

The second chapter provides a description of tort law in the United States. This discussion entails a general overview of the legal concepts involved and explains typical justifications used to ground legal action against transportation departments. It also presents an extensive review of successful and unsuccessful attempts undertaken by other states to reduce highway agency liability.

In chapter three, Arizona becomes the focus of the report. Here, tort statutes and case law are considered in their historical and constitutional context. The discussion emphasizes the impact of Arizona's tort law on highway agency liability. Previous legislative and popular attempts to achieve tort reform are also examined.

In the fourth chapter of the report we formulate a number of options for tort reform that directly address the Arizona Department of Transportation's liability concerns. The positive and negative aspects of each these legislative alternatives are also addressed.

Finally, in the concluding chapter, we consider the political feasibility of each of the possible options for reform. Members of the legislature, including party leaders in both chambers are interviewed to provide valuable insight into the decision making process itself and suggest factions that might favor or oppose each reform option. This chapter recognizes the political nature of tort reform and ensures that all feasible options are considered in a political context. By approaching the subject in this manner, ADOT is better equipped to understand the tort reform environment and, subsequently, propose reform options that possess a greater likelihood of success.

CHAPTER ONE: THE TORT LIABILITY CRISIS

In recent years, the law concerning the design, construction, and maintenance of roads has been in a state of transition. Traditionally, states and their highway agencies could not be held liable for injuries that occurred on roadways. In the decades following World War II, however, state departments of transportation have become increasingly liable for death, injury, and property damage resulting from the negligent design, construction, and/or maintenance of roads and highways. One result of this legal transition has been a dramatic increase in the amount of time, energy, and public dollars that states have been forced to dedicate to both defending themselves in tort suits and settling any subsequent claims. A concise review of both the changes in the legal environment that states operate within and the associated monetary consequences of those alterations follow.

SOVEREIGN IMMUNITY

Following the American Revolution, English common law helped to form the foundation of jurisprudence in the United States. Common law "refers to the body of law developed by the courts in the cumulative adjudication of individual cases and is to be distinguished from statutory law, which is enacted by legislative bodies."[1] One English legal principle adopted in the United States was the doctrine of sovereign immunity. This rule, as established by a number of early Supreme Court decisions, held that Federal and State governments, as the sources of all laws, were immune from suits initiated without their consent.

Subsequently, until the middle of the twentieth century American citizens who were harmed as a result of the alleged negligence of state governments and their agencies had no recourse to seek compensation for their injuries. The laws in most states held that the state could not be sued or that if it was susceptible to suit it could not be held liable in tort. A tort "is a civil wrong committed by a person upon another or against another's property."[2] The doctrine of sovereign immunity, then, freed states in general and highway agencies in particular from civil liability for what would otherwise be tortuous conduct.

After World War II, however, the notion that an individual should have no recourse in law when involved in a dispute with a government entity began to lose support in the political and juridical arenas. Legislatures and courts gradually began to advocate legislation and case law that held governments and their agencies accountable for injuries caused by their alleged negligence. The first legislative effort to undermine the doctrine of sovereign immunity came

[1] Martin, Stephen F. J. "Design Exceptions: Legal Aspects." In Transportation Research Record No. 1445: Highway and Facility Design. TRB National Research Council, Washington D.C., 1994, 9. 156.
[2] Hall, Kermit L. Tort Law in American History, New York: Garland Publishing, Inc., 1987, p. xi.

with the passage of the Federal Tort Claims Act (FTCA) in 1946. This law essentially waived the federal government's traditional immunity in tort.

The passage of the FTCA resulted, in part, from two related trends in American history. First, there was a growing perception that the doctrine of sovereign immunity unjustly deprived citizens of the opportunity to seek compensation for injuries resulting from the negligent acts of public entities. This attitude, however, was not entirely new to American legal thought. In fact, U.S. Supreme Court Chief Justice John Jay declared in the late eighteenth century that, "the feudal doctrine of sovereign immunity [is] antagonistic to the idea that sovereignty resides in the people."[3] Second, the likelihood of the federal government being responsible for personal damages increased as its role in society rapidly expanded. Consequently, Congress was overwhelmed with thousands of "private bills" that representatives introduced every year to compensate victims.[4] The 1946 law, then, had the effect of both reducing Congress's legislative workload and addressing the belief that the public should be able to hold the government accountable for wrongful conduct.

The precedent set by the FTCA was not ignored by the individual states and, over time, they began to review and revise their conception of the doctrine of sovereign immunity. The degree and pace of this change has varied significantly from state to state. In general, though, states have experienced slow and steady erosion of their sovereign immunity. However, in some states, like Arizona, the changes in tort law were swift and dramatic.

With *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P2d 107 (1963), Arizona was one of the first states to abolish the concept of sovereign immunity. Interestingly, the defendant in this case was a highway agency and the lower courts dismissed the case based on the rule of sovereign immunity. On appeal, however, the Supreme Court of Arizona overturned existing law and abolished the doctrine of sovereign immunity. The court held that "the State highway department was liable . . . for the negligence of those individual employees who actually were guilty of some tortuous conduct or of those individual employees who were in sufficient control of the highway or the particular job as to be in fact responsible."[5]

In fact, with *Stone v. Arizona Highway Commission* the Arizona Supreme Court recounted the history of sovereign immunity and clearly established that they felt this doctrine was no longer appropriate in a modern environment. In their decision, the court affirmed: "We are of the opinion that when the reason for the rule no longer exists, the rule itself should be abandoned."[6] The court further stated:

> In 75 A.L.R. 1196, a classic observation as to the sociological aspects of sovereign immunity appears which has since been quoted with approval in several jurisdictions; . . . "The whole doctrine of governmental immunity from liability for tort rests upon a rotted foundation. It is almost incredible that in this modern age of comparative sociological

[3] Monaghan, Henry Paul. "The Sovereign Immunity 'Exception,'" In Harvard Law Review, 1996, 110: 1, p. 102.
[4] "Government Tort Liability," In Harvard Law Review, May 1998, 111: p.2010-11.
[5] Thomas, Larry W. "Liability of State Highway Departments for Design, Construction, and Maintenance Defects," In Transportation Law, Vol. 3, Ch. VIII, p. 1782.
[6] Martin, Stephen F. J. "Design Exceptions: Legal Aspects," In Transportation Research Record No. 1445: Highway and Facility Design. TRB National Research Council, Washington D.C., 1994, 9. 157.

> enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the king can do no wrong,' should exempt the various branches of the government from liability for their torts, and the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs."[7]

The language of this decision clearly indicated the court's lack of support for the doctrine of sovereign immunity in Arizona.

Although not all changes have been as decisive as those initiated by the Supreme Court of Arizona, it is safe to say that in recent decades we have witnessed continuous erosion of the doctrine of sovereign immunity at the state level. The degree of legal change has varied significantly from jurisdiction to jurisdiction, with some states completely abolishing immunity and others either maintaining partial immunity or enjoying judicial and/or legislative waivers. Presently only six states (Arkansas, Maine, Mississippi, North Dakota, Wisconsin, and Wyoming) retain full immunity.[8] In short, the trend in the last half of this century is toward holding governmental entities, like state highway departments, responsible for negligent activities.

TORT LIABILITY TRENDS

Generally speaking, two related trends have developed in those states that have seen their sovereign immunity abolished or diminished. First, citizens have increasingly tried to hold states and their agencies partially or totally liable for death, injury, and/or property damage resulting from an alleged negligent action. In fact, a survey conducted by the American Association of State and Highway and Transportation Officials (AASHTO) found that between 1972 and 1991 the number of tort claims filed against governmental entities grew at almost 15 percent per year. During this period, state highway agencies were the target of more than 330,000 suits.[9]

Second, the costs associated with state agencies defending themselves in tort suits and paying for any subsequent settlements have been burdensome. For instance, in Managing Highway Tort Liability, Russell M. Lewis estimated that in 1991 tort suits involving highway agencies at all levels of government cost as much as $850 million.[10] Even more unsettling than the considerable increase in claims and the associated costs is the unpredictable nature of the liability environment that most states presently confront. More specifically, the number of suits that states and their agencies must contend with can increase at any given time and the potential for considerable financial losses in the years to come is simply staggering.

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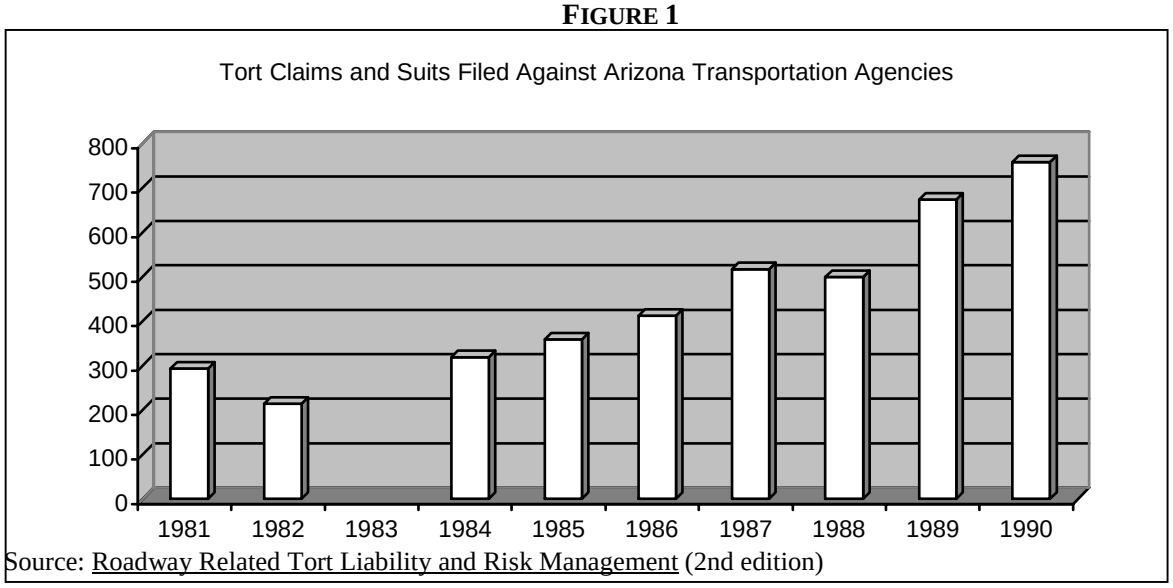
[7] Stone v. Arizona Highway Commission, 93 Ariz. 338, 381 P2d n.1 (1963).
8 Ibid.
[9] Lewis, Russell M. "Managing Highway Tort Liability: A Synthesis of Highway Practice," National Cooperative Highway Research Program, Synthesis 202, Transportation Research Board, 1994, p3.
[10] Ibid.

The Case of Arizona

The state of Arizona is reflective of both of these national trends. If we observe the frequency of tort claims and law suits filed against Arizona transportation agencies between 1981 and 1990, it becomes apparent that these organizations experienced a sharp increase in the incidence of these actions (See Figure 1).[11] The trend is undeniable and decidedly upward, with Arizona transportation agencies experiencing a 250% increase in claims filed against them during this period. In terms of raw numbers of claims, they shot up from 293 in 1981 to 758 in 1990.

FIGURE 1

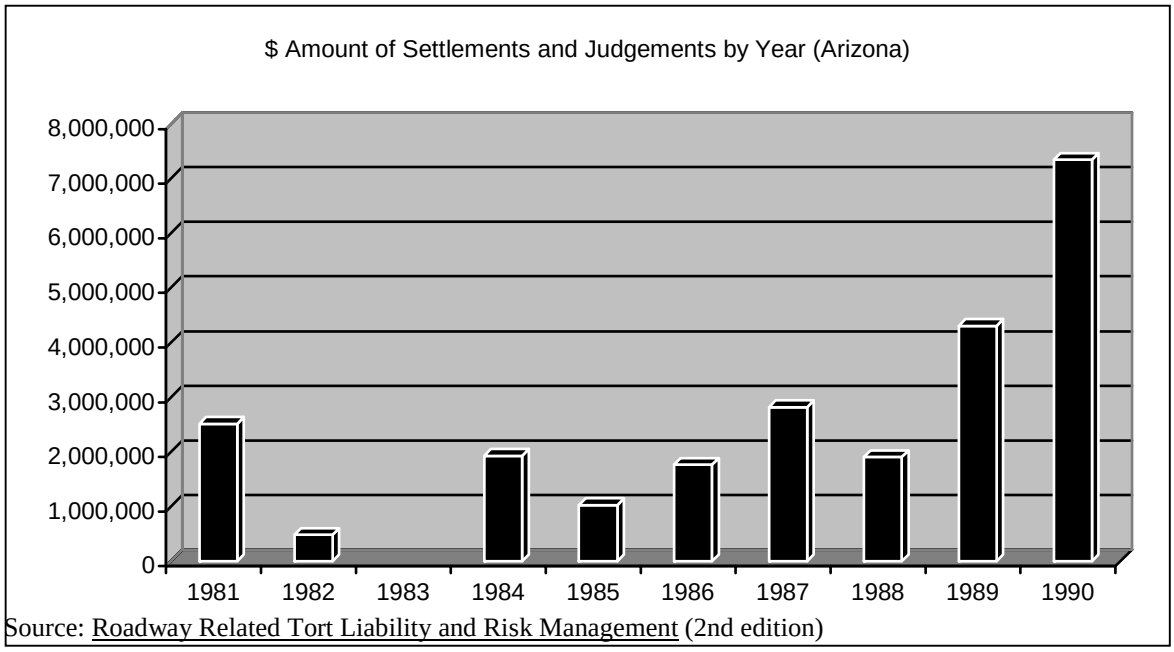


Source: Roadway Related Tort Liability and Risk Management (2nd edition)

However, and perhaps even more critical, this substantial increase in cases filed translated into a dramatic expansion in financial liability for Arizona's transportation entities. Figure 2 shows that the amount spent on settlements and judgements swelled from $2,518,000 in 1981 to $7,348,000 in 1990.[12] In other words, the increase was extreme, with liability expenditures growing by 292% during the period.

[11] Turner, Daniel S. and Kenneth R. Agent. Roadway Related Tort Liability and Risk Management, 2nd Edition, The Kentucky Transportation Center, January 1992, p. 7.
[12] Ibid., p. 9.

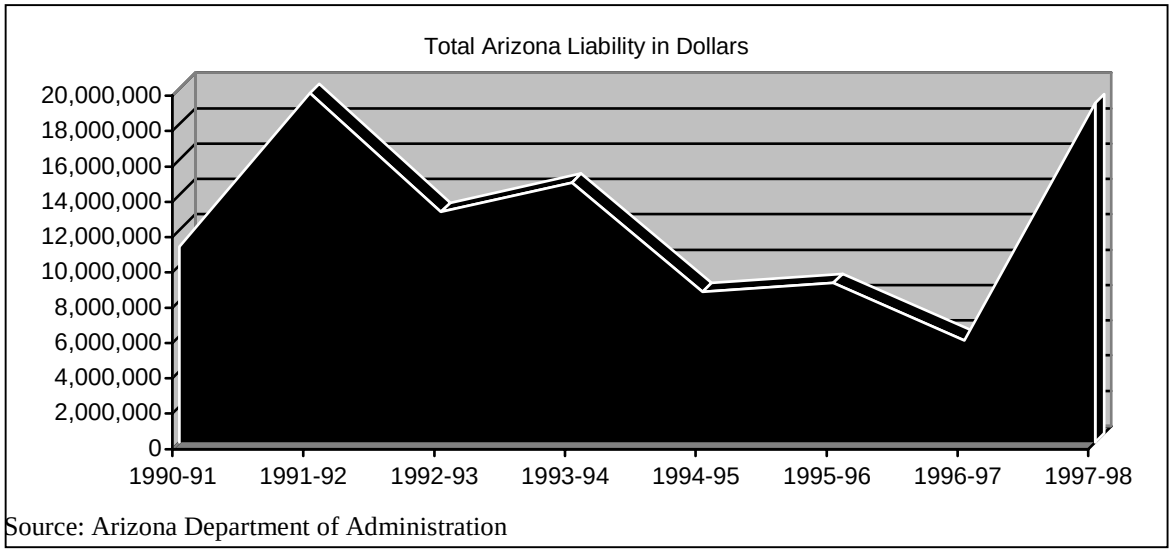
FIGURE 2



Source: Roadway Related Tort Liability and Risk Management (2nd edition)

Significantly, this trend advanced into the 1990's. Overall, according to Arizona Department of Administration records, the state's total liability costs increased by 400% in the 1990's when compared to the previous decade. Between 1990 and 1998, Arizona's total tort expenditures were just over $100,000,000 while the total cost for the 1980's was approximately $24,000,000.

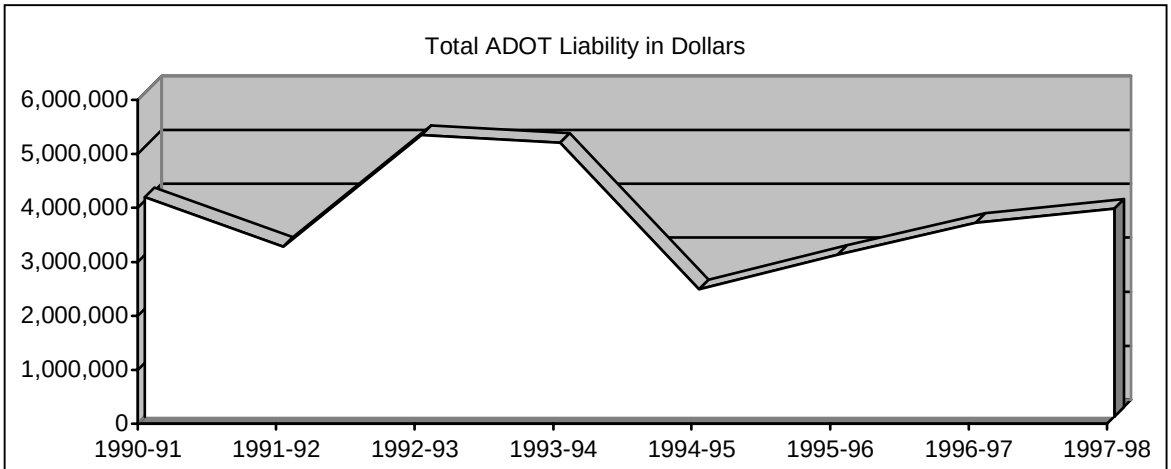
FIGURE 3



Source: Arizona Department of Administration

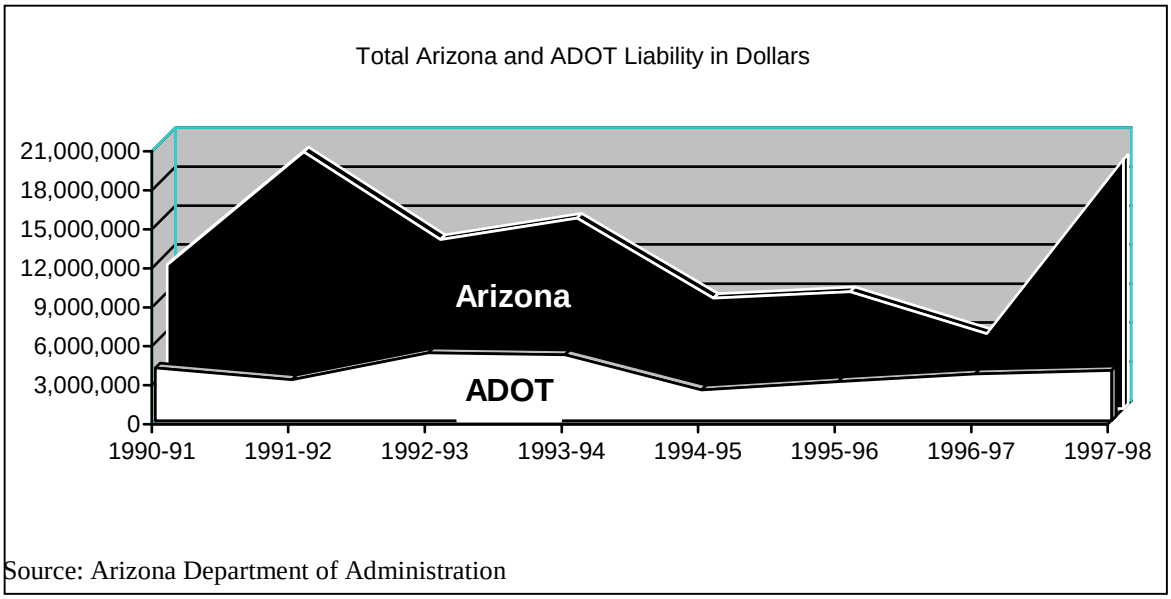
If we shift the level of analysis, we find the Department of Transportation's liability costs make up a significant portion of the state total tort related expenditures (Figure 4). In fact, ADOT's expenses (Figure 5) on this front have often been responsible for at least a third of the state's total liability costs (1990-91, 1992-93, 1993-94, 1996-97). Elaborating on our earlier comparison, ADOT has already spent over $30,000,000 in the 1990s while the total cost for the state of Arizona in the 1980s was approximately $24,000,000. The trends for ADOT reflect those present at the state and national level, with unpredictability and high costs characterizing the last decade.[13]

FIGURE 4



Source: Arizona Department of Administration

FIGURE 5



Source: Arizona Department of Administration

[13] Ibid.

The Unpredictable Nature of the Liability Environment

The above data reflects the unpredictable and costly nature of the liability environment. Although the state or a particular agency may experience short-term declines in liability expenditures, they always live with the very real threat of having to contend with a settlement worth millions of dollars. This is particularly true of ADOT and other lower transportation related agencies.

For instance, in August of 1996, a Flagstaff Unified School District (FUSD) bus with 31 student passengers rolled over several times and, as a result, two of the children on board sustained severe, debilitating injuries. In the resulting court cases, the school district was found to be responsible for the negligent acts of the bus driver. Additionally, ADOT was found to be negligent for not having placed rumble strips on the stretch of highway where the accident occurred. The jury found FUSD liable for 26 million dollars in damages to the two severely injured students (*Dowding v. FUSD, Carlson v. FUSD*). Of this amount, ten million dollars went to the legal representatives of the two children. The school district was also ordered to pay the other 29 passengers a total of two million dollars. For its role in the accident, ADOT incurred two million dollars in liability costs (*Dowding v. Arizona, Carlson v. Arizona*).[14]

Another example of the unpredictable and costly nature of the tort system is illustrated by the court case *Amell v. Arizona*. In 1996, a 21-year-old woman lost control of her vehicle and ran into a guardrail. The accident occurred on a stretch of road that had just been resurfaced by ADOT. The Plaintiff claimed that her car went out of control because of the slick spots and/or the amount of gravel left behind by the maintenance crew. ADOT was considered negligent in this case and, in late 1998, agreed in an out of court settlement to pay 6.8 million dollars in damages.[15]

A series of other recent cases also reflect the unpredictable and costly nature of the liability environment that public transportation entities must contend with. In *Landers v. Arizona*, for instance, the plaintiff was awarded a total of 4.5 million dollars. In this instance, both ADOT and the city of Phoenix were responsible for 2.25 million dollars in damages. Lastly, in *Cohn v. Arizona* (1998) the plaintiff was awarded approximately 4 million dollars, with ADOT paying 1 million and the City of Phoenix paying about three million in damages.[16]

Summary

Two trends characterize the existing tort liability environment that public entities, like ADOT, encounter. First, states and their transportation related agencies are spending millions of dollars each year on liability settlements. More important, the amount of money required to

[14] This information was gathered during a phone interview (December 15, 1998) with the information director (Gary Leatherman) of the Flagstaff Unified School District.
[15] This information was gathered during a phone interview (January 20, 1999) with Carrie Lowrance and Debbie Spinner of Arizona's Attorney General's Office.
[16] Ibid.

cover the costs of tort suits has risen dramatically over the last two decades. In fact, Arizona's liability expenditures in the 1990s are four times what they were in the 1980s.

The second trend concerns the highly volatile nature of the current tort environment. At any point in time, a successful plaintiff can confront a public entity with a settlement worth millions of dollars. To say that the existing system represents a significant financial burden and exacts a toll on long term planning decisions is a gross understatement. In short, reform efforts that might bring a desirable level of predictability and reasonability to the tort process need further exploration.

CHAPTER TWO: TORT REFORM CLIMATE IN THE UNITED STATES: Terms and Concepts

TORT LIABILITY

Tort refers to the body of the law that allows an injured person to obtain compensation from the person or entity who caused them injury. After an injury occurs, whether intentionally or negligently, a court can require whoever is at fault to pay money to the injured party (**damages**) so that the person causing the harm will be held accountable for their action. They may be responsible for injuries to people or damages to property.[17] A tort also serves as a deterrent by sending a message about what is unacceptable conduct.

Under the principle of **joint and several liability**, the injured party can recover the entire amount from a single defendant regardless of the percentage of damages that party is responsible for. Effectively, courts can force a single defendant, like a government agency, to pay the entire settlement when other parties to the suit do not have sufficient resources or insurance to cover their obligations.[18]

BASES OF TORT LIABILITY

Intentional Torts

There are three bases of tort liability: **intentional torts, negligence,** and **strict liability**.[19] Examples of intentional torts include assault, battery, false imprisonment, and intentionally causing emotional distress. These torts require that the person committing the act, known as the **tortfeasor**, intend to cause some injury or intend to commit an act that causes some harm.

Negligence

Negligence is the second form of tort. To be liable for negligence, there must be a **duty** between the tortfeasor and the injured party and a **breach** of that duty that **proximately causes** some **damages** to the injured party.[20] We generally find breaches of duty when the tortfeasor does not exercise ordinary or reasonable care under the circumstances. However, a more specific

[17] Daniel S. Turner and Kenneth R. Agent, eds., Roadway Related Tort Liability and Risk Management, 2nd ed., (The University of Alabama and the University of Kentucky, 1992), 14.
[18] National Cooperative Highway Research Program, Synthesis of Highway Practices 106, Practical Guidelines for Minimizing Tort Liability (Washington, D.C.: National Research Council, Transportation Research Board, 1983), 9.
[19] Dan B. Dobbs, Torts and Compensation: Personal Accountability and Social Responsibility for Injury, 2nd ed., American Casebook Series (St. Paul: West Publishing Co., 1993), 5-6.
[20] 57A Am Jur 2d, Negligence, § 78; John C. Glennon, Roadway Defects and Tort Liability (Tucson: Lawyers & Judges Publishing Co., 1996), 17.

standard, often set by statutes and case law, may apply in other circumstances.[21] When we use a violation of a statute as a standard, we call it **negligence *per se*.**

The concept of proximate causation requires that an injury is caused by a breach and is reasonably connected to a defendants conduct and the likelihood that harm would arise from that conduct. We generally refer to this as "**forseeability**."[22] With the legal doctrine of *res ipsa loquitur***,** we assume a defendant acted negligently simply because a harmful accident occurred. This presumption arises when the defendant controlled the event that caused the accident, when the accident could have only happened as the result of a careless act, and when the plaintiff's behavior did not contribute to the accident.

On occasion, a Court may find that the injured party is also negligent and, consequently, may reduce or eliminate the award of damages. The ability to decrease an award depends on whether a state has accepted **contributory** or **comparative negligence**. Under contributory negligence, a plaintiff cannot receive compensation if his own negligence proximately contributed to the injury. It is important to note, however, that most states view this concept as harsh and have generally modified or abandoned it.[23] For the most part, states have replaced contributory negligence with the legal concept of comparative negligence. Under comparative negligence, if a Court determines that the injured party is negligent, they do not forfeit all compensation unless they are responsible for 50% or more of the harm.[24] In a **pure comparative negligence** state, the injured party collects whatever percentage of the damages they are not responsible for, no matter how low that percentage.[25]

Strict Liability

Strict Liability is decided against a defendant without the need to prove intent, negligence or fault; as long as the plaintiff can prove that it was the defendant's object that caused the damage. The most common use of the doctrine in recent years concerns product liability for defects in design and manufacturing.[26]

Nuisance is another form of liability that is concerned with the excessive or unlawful use of one's property in a manner that unreasonably creates an annoyance or inconvenience to a neighbor or to the public. The effect, not the cause, is the focus of the doctrine.[27] When a court uses the principle of nuisance to handle a case, it may be applying strict liability without using the name of the doctrine.[28]

[21] 57A Am Jur 2d, Negligence, §144.
[22] Ibid., § 488.
[23] Ibid., § 842.
[24] 57B Am Jur 2d, Negligence, §1130.
[25] Ibid.
[26] 74 Am Jur 2d, Torts, § 15.
[27] Turner, 16.
[28] 57A Am Jur 2d, Negligence, §396.

Vicarious Liability and Sovereign Immunity

With State Departments of Transportation (DOT), two further concepts apply to tort liability: **vicarious liability** and **sovereign immunity**. Because DOTs are employers, they are, at times, vicariously liable for the actions of their employees. We assign this liability to the employer under the theory of *respondeat superior*, or "let the master answer."[29] The employer is not liable for all actions of the employee, only those that occur during the course of employment. With intentional torts, this scope is even narrower. The principal reason for this concept is to allow an injured party to have an effective remedy when they are injured by a person of "small means."[30] The employer is then responsible for trying to regain damages paid to the injured party from the employee.

Sovereign immunity applies to a DOT by the fact that the DOT is a State agency. Rooted in the English common law idea that "the King can do no wrong," this principle prohibited anyone from suing the King in his courts without his permission. In addition, the doctrine also covers those who acted with the King's authority. The United States adopted this principle early in its history and used it, in part, to protect public entities from liability in tort. Today, the doctrine still exists, but only protects public entities to the extent that statute or case law has not eroded it.

State and federal tort claims acts have generally replaced sovereign immunity. The **Federal Tort Claims Act** was enacted in 1948 and amended in 1988. This act allowed the federal government to be sued like a private citizen while retaining some features of immunity.[31] One of those reservations maintains federal immunity from liability for the intentional torts of employees.[32] At the state level, tort claims acts were often used to establish partial immunity after state courts abolished common law sovereign immunity.[33] While some of these acts grant liability with exceptions, some states retain immunity with exceptions of liability.

Governmental-Proprietary Distinctions and **Discretionary-Ministerial Distinctions** delineate state liability under sovereign immunity and tort claims acts. Governmental actions are those that benefit all inhabitants of a state and do not create liability. With proprietary actions, if the state acts to mainly benefit a money making venture, they can be held liable. While this distinction comes from English law and was accepted in the United States, its use as a defense "seems to be waning."[34] Discretionary decisions, or the power to make a choice among valid alternatives using independent judgement, are immune to liability. Ministerial duties, or clearly defined tasks that do not permit the exercise of discretion, are not immune. Planning level decisions are generally held to be discretionary while operational level decisions are generally held to be ministerial.[35]

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[29] Black's Law Dictionary, 6th ed., s.v. "Respondeat Superior.
[30] 57B Am Jur 2d, Negligence, § 1753.
[31] 28 USC § 2674.
[32] 35 Am Jur 2d, Federal Tort Claims Act, § 42.
[33] Restatement (Second) of Torts § 895B note (State Positions on Governmental Immunity for State and Local Government Entities).
[34] Turner, 16.
[35] Ibid.

DEPARTMENT OF TRANSPORTATION LIABILITY

Through its normal activities, a transportation department may be liable for a wide range of torts. "The duty to the public for reasonably safe travel extends to all parties responsible for the highway system, including individual employees of public agencies and private contractors."[36] Transportation entities and their employees must maintain the duty of "reasonably safe travel" throughout every phase of highway design, construction, and maintenance. Since the duty of safe travel is broad, we should not be surprised that this is the main area of liability for DOTs.

To protect itself from liability, a DOT needs to follow reasonable standards. These may take the form of statutes, regulations or even internal policies. Relying upon these standards, however, does not eliminate the possibility of liability. While violating a statutory standard is likely to generate liability, obeying a statutory standard is not a defense if common law negligence would require more to be reasonable under the circumstances. However, if the statutory standard is higher than common law negligence, then obeying the standard would offer a sound defense to liability.[37]

A DOT is liable for the actions of its employees through vicarious liability and the principle of *respondeat superior* unless it has sovereign immunity. These concepts expand the potential for tort liability beyond the business of a DOT to the full range applicable to any employer. For example, a person could hold a DOT liable for vehicle accidents caused by its employees at a construction site or even when they are travelling to the site. DOTs, then, are generally responsible for actions taken within the scope of employment, unless that state's sovereign immunity protects the DOT from such liability.

Ultrahazardous or abnormally dangerous activities or instrumentalities can generate strict liability for a DOT. For example, the storage of explosives generally and the "conduction of blasting operations" that cause damage to adjoining property have been held to be within strict liability.[38] If a DOT is engaged in such activities, or other abnormally dangerous operations, it is liable for damages. Furthermore, a DOT can be strictly liable in product liability if it ever manufactures, distributes or sells any item that injures people or property.[39]

HISTORY OF TORT REFORM IN THE UNITED STATES

For a great number of years, the judicial branch was responsible for any reforms or modifications of tort law. In recent years, however, the legislative branch has become more involved in tort reform. Certain tort concepts are solely judicial in nature while others are both

[36] National Cooperative Highway Research Program, Synthesis of Highway Practice 206, Managing Highway Tort Liability (Washington, D. C.: National Academy Press, 1994), 13.
[37] Lester A. Hoel, et al eds., Risk Management Systems Volume II: Identifications and Evaluation of Risk Elements for Highway Systems in Tort Liability (Charlottesville School of Engineering and Applied Science, Department of Civil Engineering, University of Virginia, 1991), 5, Report No. UVA/529686/CE91/105.
[38] 74 Am Jur 2d, Torts, § 15.
[39] 57A Am Jur 2d, Negligence, § 19.

statutory and judicial. Both the courts and the legislatures have embraced some tort reform while disagreement between the branches characterizes other attempts at change. A discussion of the major areas of reform follows.

Strict Liability

Today, we use strict liability in cases regarding impounding noxious substances, hazardous wastes, blasting, lateral support of neighboring property, and private liability for nuclear energy.[40] The only real reform occurring in this area concerns the application of comparative and contributory negligence as defenses. While strict liability has not looked to the injured party's negligent actions in the past, there is a growing trend toward allowing such analysis. While courts are addressing the issue over time, there is the possibility that strict liability could be included in state statutes that govern the usage of comparative or contributory negligence concepts in state courts.

Sovereign Immunity and Tort Claims Acts

In 1948, the Federal Tort Claims Act was enacted and the federal government consented to be sued "in the same manner and to the same extent as a private individual under like circumstances."[41] The statute reserved immunity for interest on damages prior to judgment and to all punitive damages. The statute also allowed the United States to assert any defense or immunity that it is entitled to and any that would be available to an employee when that employee's actions are the basis of the suit.[42]

In the 1960's and 1970's, state courts began to abolish sovereign immunity, either in part or in whole. In the 1960's Arizona, California, Kansas, Wisconsin, and the District of Columbia judicially abolished the doctrine. In the 1970's Colorado, Idaho, Indiana, Maine, Massachusetts (the court threatened to abrogate in the next case it heard if the legislature did not pass a statute), Michigan, Missouri, New Jersey, New Mexico, and Pennsylvania did the same.[43] Very few states accepted a full abrogation of the doctrine. Either the court that abolished the doctrine kept certain exceptions or the state legislature reestablished certain immunities in later legislation. These "reestablished" immunities most frequently covered discretionary functions of government and intentional torts. Alabama, Georgia, and West Virginia never had to deal with the possibility of judicial abrogation as their constitutions protect sovereign immunity.[44]

Other states implemented a tort claims act without ever facing judicial abrogation of sovereign immunity. These acts vary tremendously in the amount of liability they allow. On one extreme, Virginia retained all immunity while states like South Carolina and Tennessee retained immunity with minimal exceptions. Mississippi, New Hampshire, North Dakota, and Oklahoma only allow liability to the extent of insurance coverage. A fair number of other states, including Alaska, Hawaii, Iowa, and Nebraska have actually waived sovereign immunity generally and

[40] Dobbs, 597-599.
[41] 28 USC § 2674.
[42] Ibid.
[43] Restatement (Second) of Torts § 895B note.
[44] Ibid.

only kept exceptions for discretionary actions and intentional torts. Finally, a few states, like New York and Louisiana have completely abandoned sovereign immunity.[45]

It is fair to say that most of the reform in the area of sovereign immunity has already occurred. States have decided whether they will open themselves to liability or not. However, since most states have some form of tort claims act, it would seem that the state legislature is the most viable forum for generating reform. Legislatures could, for example, reform tort law so that design immunity for highways is included in discretionary decisions. However, since sovereign immunity is not popular with most courts, state legislatures should be aware that any action on their part is likely to face strict scrutiny from the judicial system.

Joint and Several Liability

A popular area of reform in recent decades involves the principle of joint and several liability. As discussed, this concept allows the injured party to recover the entire amount from a single defendant regardless of the percentage of damages that party is responsible for. In some cases, the plaintiff can collect the entire award from one defendant, forcing the defendant to try to collect the other defendants' "share" of the liability. Whenever the state government or its agencies are involved in a case, they are vulnerable to being the defendant who pays first, as they are often the party with the greatest assets.

In 1985, Iowa and Vermont were the first two states to address this issue. Specifically, Iowa canceled liability for defendants who were less than 50% responsible, while Vermont totally abolished the concept.[46] In all, thirty-three states have enacted some sort of joint and several liability legislation while the courts in Alabama, Indiana, Kansas, and Oklahoma simply do not apply the doctrine. Only four other states (Alaska, Louisiana, Utah, and Wyoming) have completely abandoned joint and several liability.[47] Other states, like Arizona, Nevada, and Idaho have rejected joint and several liability in general while retaining it for certain types of cases (ex. intentional torts and toxic waste cases).[48]

Other states have enacted much less aggressive reforms on this front. For instance, Wisconsin and Montana do not enforce liability if the defendant is under a certain percentage of fault, 51% and 50% respectively.[49] Other states only require a defendant to pay a multiple of their fault if they are under a certain fault percentage. For instance, in South Dakota, if the defendant is less than 50% at fault, he is not required to pay more than twice his share. In Minnesota, if a defendant is 15% or less at fault, he is not required to pay more than four times his share.[50]

Abolishment or limitation of joint and several liability is certainly an issue for a DOT. Any limit on joint and several liability can help relieve the monetary burden placed on a government agency when it is forced to pay the whole award and then pursue the other defendants for their contribution to the settlement. This type of reform can help a DOT decrease

[45] Ibid.
[46] American Tort Reform Association, Tort Reform Record, 31 December 1998, 3.
[47] Ibid., 5.
[48] Ibid., 4-5.
[49] Ibid., 4, 7.
[50] Ibid., 5-6.

their need for extremely large insurance policies as well as simplifying predictions about tort liability. Both the public and legislative bodies appear supportive of this type of reform. In addition, courts in only one state (Illinois) have made an effort to limit joint and several liability.[51]

The Collateral Sources Doctrine

The collateral sources doctrine holds that, "benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer."[52] By supporting this legal concept, we move away from the idea that a party should be compensated only for injuries actually suffered and not be provided with a "windfall."[53]

At the end of 1998, twenty-one states had some sort of collateral damage statute. Most states simply allow juries to consider other sources of compensation (i.e., insurance, worker's compensation benefits, disability payments and Social Security) when determining the award amount. Other states, like New York, mandate that the deciding body deduct collateral sources from the award.[54]

This type of reform usually experiences difficulty surviving judicial review. For instance, Ohio passed a 1987 statute that created a mandatory offset of any benefits received collaterally minus the total of any costs paid for those benefits.[55] The Ohio Supreme Court struck down the law because it allows courts to "enter judgments in disregard of the jury's verdict," and thus undermines the state constitution's provisions regarding a citizen's right to a jury trial.[56] Another example involves Alabama, where the court declared that an evidentiary abolishment of the collateral sources doctrine violated equal protection, due process and the right to a trial by jury under the Alabama Constitution.[57] However, statutes that only enter the collateral sources as evidence without mandating their deduction from the award have either not been challenged or have withstood challenge when judicially reviewed.

Reforming the collateral source doctrine could significantly reduce the liability of a DOT. However, efforts to mandate their deduction from proposed award amounts will invite a great deal of legal criticism. On the other hand, legislation that allows a jury to consider insurance, worker's compensation benefits, disability payments and Social Security when considering damages is likely to withstand judicial scrutiny. Therefore, it appears that the best policy choice involves the creation of a statute that permits the presentation of collateral sources and lets the jury use the information as they see fit.

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[51] Bruce A. Finzen, Barbara J. Haley and Kevin A. Shaw, "Illinois High Court Latest to Nix Tort Reform Law," National Law Journal, 16 February 1998, B9, B15.
[52] 22 Am Jur 2d, Damages, § 566.
[53] Ibid.
[54] American Tort Reform Association, 9.
[55] Ibid., 10.
[56] "'Collateral Source' Rule Can't Be Abolished," Lawyer's Weekly USA (Internet Archives), 20 June, 1994.
[57] "'Collateral Source Rule' Cannot Be Abolished; Statute is Struck Down," Lawyer's Weekly USA (Internet Archives), 26 August, 1996, 98 LWUSA 936.

Non-Economic and Punitive Damages

Along with joint and several liability, another focal point of tort reform concerns reducing the size of settlements. Of the nine states (Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Minnesota, Oregon, and Ohio) that have passed legislation in this area, the highest cap is $500,000 for non-economic damages (e.g., pain and suffering, emotional distress, etc.) in Maryland, Oregon and Ohio.[58] Colorado has the lowest cap at $250,000 - unless the court finds that there is clear and convincing evidence for a larger award of up to $500,000. In Ohio and Alaska, if the plaintiff can show some permanent deformity or injury, then the cap is raised to the greater of $1 million or an award amount that is then multiplied by the plaintiff's life expectancy.[59]

States have also tried to address the size of settlements involving punitive damages designed to punish the wrongdoer for their conduct.[60] Since these damages are not based upon the injury to the plaintiff, they are often viewed as a windfall. Thirty states presently have some statute that restricts punitive damages.[61] These restrictions range from total prohibition of such damages in New Hampshire to straight dollar amount caps in Georgia and Virginia. Other states create a cap by setting an amount using a multiplier on compensatory damages. For example, New Jersey has a $350,000 cap or five times compensatory damages whichever is greater. Instead of limiting awards, other states such as Oregon and South Carolina require that punitive damages be proved through clear and convincing evidence, a higher standard than is normally applied to damages. New York and Iowa have not instituted a cap, but have instead required that the state be given a certain percentage of the punitive award.[62]

In general, state courts have not looked favorably upon tort reforms that place limitations on damages. For instance, the Illinois Supreme Court overturned a very broad reform statute that included a $500,000 cap on non-economic damages. The court stated that the cap on non-economic damages violated equal protection and, therefore, the Illinois Constitution by arbitrarily discriminating against severely injured plaintiffs.[63] A number of other state courts have also overturned statutes limiting non-economic damages including Alabama, Florida, New Hampshire, and Washington.[64] Attempts to limit punitive damages have also fared poorly. For instance, the Ohio Court of Appeals declared a $250,000 cap on punitive damages as unconstitutional for violating equal protection and due process.[65] In addition, the statute overturned by the Illinois Supreme Court contained a provision that limited punitive reparations. However, this court did not specifically discuss that provision in their decision. They simply

[58] American Tort Reform Association, 8.
[59] Ibid.
[60] 22 Am Jur 2d, Damages, § 762.
[61] American Tort Reform Association, 1.
[62] Ibid., 14-19.
[63] "Tort Reform Statute is Unconstitutional," Lawyer's Weekly USA (Internet Archives), 12 January, 1998, 98 LWUSA 9.
[64] Finzen, endnote 2.
[65] "Punitive Damages Cap Violates Constitution," Lawyer's Weekly USA (Internet Archives), 16 November, 1998, 98 LWUSA 936.

argued that since the unconstitutional aspects of the law were unseverable from the rest of the law, the entire statute was unconstitutional.[66]

In short, courts appear to be hostile to attempts at placing limitations on non-economic or punitive damages. The popular appeal of this type of effort, however, suggests that it is likely to be at the center of the reform movement for some time to come. State legislatures will undoubtedly attempt to develop limits that courts will support. However, it is questionable whether new legislation of this kind can survive judicial scrutiny.

Expert Witnesses

Attorneys employ **expert witnesses** in personal injury cases to comment on the validity of arguments involving scientific or technical expertise. In fact, expert witnesses are the only witnesses that may offer an opinion on topics or facts that they do not have "personal knowledge" about–other than what they hear in court. In recent years, there has been a limited amount of reform activity in this area in both the legislative and judicial arenas.

At the national level, in 1995 Senator Charles Grassley introduced a bill that would limit each party to one expert "per subject at trial."[67] In addition, the House of Representatives considered the Common Sense Legal Reforms Act of 1995. The act would amend the Federal Rules of Evidence, the main area of law governing the use of expert witnesses, so that only testimony based on "scientifically valid reasoning" could be considered expert. The reform legislation would also disallow expert witnesses from receiving contingency fees.[68] In other words, if the expert's fee were dependent upon the success of the case, the testimony would not be allowed. Neither attempt at reform was successful.

In the judicial arena, efforts to regulate the use of expert witness testimony have fared rather well. In 1993, the U.S. Supreme Court held that theoretical testimony must satisfy basic "scientific" requirements. For instance, a court would want to know if anyone had tested a theory or technique, if other experts reviewed those tests, what the possible rate of error is, and if the scientific community generally accepts it.[69] In 1999, the U.S. Supreme Court expanded those requirements to "technical" or "other specialized knowledge" testimony.[70] While not specifically intended as a tort reform, the decision makes it more difficult to use expert witness testimony in liability cases.

Current Federal Legislative Attempts at Tort Reform

Despite the considerable popular support present in recent years, the U.S. Congress has been unable to enact any reforms. This is not because they have not tried. In the 1990s, Congress

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[66] Finzen, B15.
[67] "Tort Reform Expected From Congress," Lawyer's Weekly USA (Internet Archives), 27 March 1995 (no page available from internet edition of article).
[68] "The Common Sense Legal Reforms Act of 1995 – Official Summary," Lawyer's Weekly USA (Internet Archives), 21 November 1994 (no page available from internet edition of article).
[69] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[70] Kumho Tire Co. v. Carmichael, 97-1709 (1999). (This decision is not yet published.)

has attempted to use the supremacy of federal law to create a uniform system of tort regarding product liability, punitive damages, and joint and several liability.[71] However, in 1996, President Clinton vetoed reform legislation.[72] Two years later, a similar bill was unable to make it past a vote to end debate in the Senate.[73]

Another type of reform that the U.S. Congress has been considering involves the passage of no-fault auto insurance. With this type of coverage, the driver would give up the right to collect non-economic damages in exchange for paying lower premiums. If the damages suffered exceeded the insurance coverage, the injured party could still sue for the uncompensated damages.[74] This type of reform legislation may have the effect of reducing the number of liability cases pursued.

[71] Andrew Blum, "Tort Reform: Camel's Nose into State Law," National Law Journal, 20 March, 1995, A1.
[72] "'Tort Reform' Vetoed by President Clinton," Lawyer's Weekly USA (Internet Archives), 20 May, 1996, 96 LWUSA 483.
[73] "Products Liability Bill Won't Pass This Year," Lawyer's Weekly USA (Internet Archives), 27 July, 1998, 98 LWUSA 597.
[74] "Auto Insurance Change Gets Support in Congress," Lawyer's Weekly USA (Internet Archives), 11 August, 1997, 97 LWUSA 642.

Table 2-1 Summary of Successful Tort Reforms (as of 12/31/98)

State	Joint and Several Liability	Non-Economic Caps	Collateral Sources
Alabama			X
Alaska	X	X ($500,000)	X
Arizona	X		X
Arkansas			
California	X		
Colorado	X	X ($250,000)	X
Connecticut	X		X
Delaware			
D.C.			
Florida	X		X
Georgia	X		
Hawaii	X	X (375,000)	X
Idaho	X	X (400,000)	X
Illinois			X
Indiana			X
Iowa	X		X
Kansas		X ($250,000)	
Kentucky	X		X
Louisiana	X		
Maine			
Maryland		X ($350,000)	
Massachusetts			
Michigan	X		X
Minnesota	X	X ($400,000)	X
Mississippi	X		
Missouri	X		X
Montana	X		X
Nebraska	X		
Nevada	X		
New Hampshire	X		
New Jersey	X		X
New Mexico	X		
New York	X		X
North Carolina			
North Dakota	X		X
Ohio	X	X ($250-500,000)	X
Oklahoma			
Oregon	X	X ($500,000)	X
Pennsylvania			
Rhode Island			
South Carolina			
South Dakota	X		
Tennessee	X		
Texas	X		
Utah	X		
Vermont	X		
Virginia			
Washington	X		
West Virginia			
Wisconsin	X		
Wyoming	X		

CHAPTER THREE: TORT REFORM HISTORY IN ARIZONA

In this chapter, we forward a brief history of tort reform in the state of Arizona. We begin by examining the ways in which constitutional factors help to shape the reform environment. Then, we review activities involving sovereign immunity, comparative negligence, joint and several liability, strict liability, damages, collateral source doctrine, statutes of repose, subrogation, and no-fault insurance. We conclude by providing a general summary of the tort reform climate in Arizona.

THE ARIZONA CONSTITUTION

Arizona is one of a few states where the constitution restricts tort reform. The constitutions of Kentucky, Ohio and Pennsylvania also restrict the capacity of their legislatures to modify the damages recoverable from personal injury suits.[75] In Arizona, three sections of the constitution apply restraints on this type of lawmaking. First, Section 23 of Article II provides that "the right of trial by jury shall remain inviolate." Next, Section 31 of this same article states that "no law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person."[76] Finally, Section 6 of Article XVIII states that "the right of action to recover damages for injuries shall never be abrogated, and the amount shall not be subject to any statutory limitation."[77] These provisions have restrained the executive and legislative branches in Arizona since 1912 and they "loom large in the consideration of any tort reform proposal that would significantly alter the system by which accident victims are compensated in this state."[78]

Since the Arizona Constitution forbids the people and lawmakers from restricting a person's right to sue for damages or from limiting the amount of damages recoverable in a suit, reforms including these issues involve amending the state constitution. In Arizona, the amendment process involves two distinct stages. The first step is the initiation of an amendment by either a majority vote of both houses in the legislature, a convention called by the people and the legislature by a majority vote, or an initiative petition signed by a number equal to at least 15% of the votes cast for the office of governor in the last general election. The second step is ratification by referendum and requires a majority vote in a general or special election.[79]

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[75] Roger C. Henderson, "Tort Reform, Separation of Powers, and The Arizona Constitutional Convention of 1910. Arizona Law Review 35, no. 3 (1993): 538, note 19.
[76] ARIZ. CONST. art. II, § 31.
[77] ARIZ. CONST. art. XVIII, § 6.
[78] Henderson, 538.
[79] Gerald E. Hansen and Douglas A. Brown, Arizona: Its Constitution and Government, 2nd edition. Lanham, MD: University Press of America, 11.

On three separate occasions (1986, 1990, and 1994), voters in Arizona have been given the opportunity to amend the constitution so that a citizen's right to sue and receive damages might be restricted. The initiation of the proposals invited both opponents and proponents of tort reform to appeal for popular support. On the one side, a group funded largely by the Arizona Trial Lawyers Association and operating under the name Fairness and Accountability in Insurance Reforms (FAIR) rallied opposition to the propositions. On the other side, insurance companies, medical interests, People for a Fair Legal System, and other entities, attempted to gain the votes needed for ratification. On each occasion, a majority of voters sided with the trial lawyers and rejected the proposed amendment (Proposition 103 in 1986, Proposition 105 in 1990, and Proposition 301 in 1994).[80]

SOVEREIGN IMMUNITY

As discussed, with the *Stone v. Arizona Highway Commission* (1963) decision, the Arizona Supreme Court abolished the principle of sovereign immunity. This decision ended the era of public entity immunity from tort liability. Several years later, however, the Arizona legislature reclaimed some of the immunities the court had stripped away. The first such move came in 1971, when an exception was created for the state and its subdivisions by reinstating immunity for discretionary functions.[81] In 1973, state officers, agents and employees were further protected from liability for their actions when they had relied upon a law that the courts would later declare unconstitutional or if their action was considered discretionary. An exception to this measure was made when they took the action in "wanton disregard" of statutory duties.[82] In 1996, this protection of officers and agents was reduced. An officer was now liable for relying on an unconstitutional law to the extent that they would be liable if the law was considered constitutional, valid and applicable.[83]

In 1984, an entire article of laws that dealt with actions against public entities or public employers was enacted in Arizona. A public entity includes the state and any political subdivision of the state.[84] This legislation states that public entities are absolutely immune from liability for the acts and omissions of employees in two areas. The first absolute immunity arises when a public employee is exercising a judicial or legislative function. The second immunity covers public entities when their employees are exercising an administrative function involving the determination of fundamental government policy. This determination of fundamental government policy is defined as including, but not limited to (a) the purchase of equipment; (b) the construction or maintenance of facilities; (c) the hiring of personnel; or, (d) the provision of governmental services.[85] Essentially, this statute extends immunity to public entities when its employees are engaged in duties that require discretion or judgement.

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[80] Jona Goldschmidt, "Arizona Courts, the State Constitution, and Public Policy," in Politics in Public Policy in Arizona, Ed. Zachary Smith. Westport, CT: Praeger, 76.
[81] Ariz. Rev. Stat. Ann. § 26-314.
[82] Ariz. Rev. Stat. Ann. § 41-621(H) and (I). The statute was amended; however, the effective date of the amendment was delayed until January 1, 1996.
[83] Ariz. Rev. Stat. Ann. § 41-621(H). This is the form of the statute that went into effect on January 1, 1996.
[84] Ariz. Rev. Stat. Ann. § 12-820(6).
[85] Ariz. Rev. Stat. Ann. § 12-820.01.

Public entities can also avoid liability by using certain affirmative defenses. According to the applicable Arizona statute:

> Neither a public entity nor a public employee is liable for an injury arising out of a plan or design for construction or maintenance of or improvement to highways, roads, streets, bridges, or rights-of-way if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design, provided, however, that reasonably adequate warning shall be given as to any unreasonably dangerous hazards which would allow the public to take suitable precautions.[86]

Furthermore, no public entity or employee acting within the scope of employment is liable for punitive damages.[87] These laws illustrate that the Arizona legislature is still interested in the principles of sovereign immunity, although in a limited capacity regarding exceptions to liability.

On April 13 of 1993, Governor Fife Symington signed the Personal Injury Reform Act into law. The formal goal of this measure was to decrease the administrative costs of the tort system and insurance.[88] Included in the law was a qualified immunity that protected governmental entities from liability for injuries resulting from the operation or maintenance of completed highways, roads, streets, rights-of-way, or bridges. Plaintiffs could not recover damages unless they could prove that their injury was caused intentionally or through gross negligence.[89] ADOT, for instance, would not be liable for damages unless the plaintiff could show that the agency, "acted or failed to act when the entity knew or had reason to know that the conduct created an unreasonable risk of bodily harm to others and involved a high probability that substantial harm would result."[90]

After the legislation was passed, many sections of the law were placed on the ballot for popular review (Proposition 301, See Table 3-1). Proponents of the qualified immunity measure felt that it would reduce the overall liability of public entities and, subsequently, save some tax dollars. Since Arizona's liability expenditures had increased dramatically over the previous fifteen years, this argument was particularly appealing to many legislators and public administrators. Opponents, however, argued the measure went too far in limiting the rights of citizens to try to recover damages from the state. They were particularly concerned about the fact that the legislation required citizens to show that the government's conduct was intentional or grossly negligent. This standard would be much more difficult to prove than ordinary negligence and would likely prevent many victims from recovering damages. On November 8, 1994, the Arizona voters rejected the referendum (60% to 40%) and, as a result, declined the qualified

[86] Ariz. Rev. Stat. Ann. § 12-820.03. The text cited is from the 1993 reinstatement of the section after a different subsection of the law was declared unconstitutional. The text is nearly the same as the text in the 1984 law.
[87] Ariz. Rev. Stat. Ann. § 12-820.04.
[88] Carey J. Fox, "The Arizona Tort Reform Act: Voters Reject Widespread Reform Measures," Arizona State Law Journal 26, no. 4 (1994): 1075.
[89] Ibid., 1091.
[90] Ibid., 1093.

immunity law.[91] Therefore, the government is still held to a general negligence standard for injuries due to road operation and maintenance[92]

Table 3-1. Personal Injury and Reform Act 1993 and Proposition 301

Sections Overturned by Proposition 301	Sections Unchallenged by Proposition 301
➢ Twelve-year statute of limitations for lawsuits not already covered by time limits. ➢ Allow juries in all liability cases to consider "collateral sources" of payment when developing awards. ➢ Allow for periodic payment of damages. ➢ Allow juries to deny damages to plaintiffs who are more than 50 percent responsible for their own injuries. ➢ Public entities, like ADOT, would not be liable for the injuries or deaths caused by the maintenance and operation of public facilities unless the damage or injury was intentional or caused by gross negligence. ➢ Ease access to plaintiff medical records. ➢ Allowing subrogation - permit insurance companies to write policies that require people to reimburse their insurer for expenses if they recover damages in a lawsuit based on that injury.	➢ Immunity from suit to volunteers and emergency medical-aid employees. ➢ Individuals who are drunk or under the influence of drugs when injured and more than 50% at fault would be prohibited from suing. ➢ Limited liability for landowners who make their property available for public recreational purposes. ➢ Bar persons injured during or fleeing from a felony from suing.

COMPARATIVE NEGLIGENCE AND JOINT AND SEVERAL LIABILITY

In 1984, with the passage of the Uniform Contribution Among Tortfeasors Act, Arizona adopted the principle of "pure" comparative negligence.[93] Consequently, plaintiffs could be barred from recovering damages if their negligence were equal to or greater then the percentage of fault associated with "non-parties" in the case. "Non-parties" include those who have settled before the case was brought to trial or those immune in the suit. Juries or judges, then, could attribute fault to "non-parties" so that excessive liability was not assigned to a single defendant.[94]

In 1993, as part of the Personal Injury Reform Act, the legislature changed Arizona from a comparative to a modified comparative negligence state. As a result, a judge or jury could bar recovery if the plaintiff was fifty-percent or more liable.[95] This section was later subject to popular review as part of Proposition 301 in 1994. Proponents of this measure, like People for a

[91] Ibid., 1076.
[92] Ibid., 1090; see Arizona State Highway Dept. v. Bechtold, 460 P.2d 179 (1969).
[93] Ariz. Rev. Stat. Ann. § 12-2501-2509.
[94] Ariz. Rev. Stat. Ann. § 12-2505.
[95] Fox, 1094.

Fair Legal System, argued that the change would benefit citizens in the state by reducing litigation. This is because plaintiffs who are partially responsible for their own injuries might be more hesitant to file suit and/or more willing to accept an out-of-court settlement. Conversely, FAIR, consumer advocate Ralph Nader, and other opponents of the modified comparative negligence section contended that existing arrangements produced the most equitable results because damages are apportioned according to relative fault. Again, this legislation was overturned by voters in Arizona as part of the 1994 referendum (Proposition 301).[96] Consequently, the state still operates under the pure comparative negligence standard.

Regarding joint and several liability, Arizona legislatively abolished most aspects of this principle in 1987. Exceptions were made for hazardous waste cases and when defendants acted in concert or in master-servant vicarious liability.[97] Subsequently, defendants were only liable for the percentage of fault assigned to them by a judge or jury. They could not be required to pay for more than their "share" of fault. In 1993, the Personal Injury Reform Act would also have modified joint and several liability to conform to modified comparative negligence but, again, the 1994 referendum rejected this section.

On the judicial front, the courts in Arizona have addressed how the number of defendants relates to joint and several liability. In 1993, the Arizona Court of Appeals held that a settlement with one defendant could not be deducted from the liability of other defendants. More simply, a plaintiff who settles with one defendant can specify in the agreement that the defendant cannot be sued by the other defendants in the case.[98] Again, when stipulated in a settlement between the plaintiff and one defendant, that defendant can only be held responsible for their share of the fault and is not liable for contribution to the other defendants in the case.

In summary, through the laws governing comparative negligence and joint and several liability, all parties are responsible for their proportion of fault. Once that fault is determined, each defendant is liable for their percentage and only their percentage of the damages awarded. So, for instance, a plaintiff that is found to be sixty percent at fault for his injuries can still recover the other forty percent from the defendant.

STRICT LIABILITY

As discussed, strict liability is subject to reform through comparative negligence principles. Strict liability classically imposes obligation without reference to fault or the actions of the plaintiff. There has been no reform efforts involving those instances when strict liability is imposed because of hazardous activities.

On the other hand, a recent Arizona court case (1995) has dealt with strict product liability and the principles of comparative negligence in an interesting manner. Decisions before this case held that comparative fault principles could not be used in product liability cases. With Jimenez v. Sears, Roebuck and Co., however, the court decided that comparative negligence

[96] Ibid., 1076.
[97] Ariz. Rev. Stat. Ann. § 12-2506.
[98] Herstam v. Deloitte & Touche, LLP, 919 P.2d 1381 (1996) cited in "Plaintiff 'Guarantees' Defendant Won't Be Sued for Contribution," Lawyers Weekly USA (Internet Archives), 20 May 1996, 96 LWUSA 461.

through the misuse of a product is applicable whether we base the case in negligence or strict products liability. In this case, Richard Jimenez purchased a hand-held electric disc grinder from a Sears store in Sierra Vista, Arizona. While using the item to smooth down a weld on a trailer tongue, the disc shattered and the resulting fragments entered his body causing serious injuries. Because the safety guard was partially turned away from the plaintiff, Sears argued he was using the tool improperly. The jury awarded Jimenez $112,000 in damages. Sears appealed because the presiding judge told the jury they could only deduct the plaintiff's portion of fault from the damages if he were the sole cause of the injury. The Supreme Court of Arizona agreed with the defendant and sent the case back for a new trial in which the judge would inform jurors that they could consider whether the plaintiff was partially responsible and deduct that amount from any damages.[99]

DAMAGE CAPS

Arizona has a brief history of successful reform in the area of damages. In 1901, the territorial legislature limited wrongful death actions to $5,000.[100] This cap was eliminated, of course, when Arizona was granted statehood in 1912 and the new Constitution specifically prohibited such limitations.[101] In 1986 and 1990, there were unsuccessful attempts to amend the Constitution to allow damage caps. These propositions were defeated by popular vote. Another measure to place a cap on damage awards (and sponsored by the Senate President) passed the Senate in 1996, but died in the House. An interesting aspect of this legislation was its inclusion of a "people's veto."[102] Simply, the Senate proposed to amend the Constitution but allow the "people" to ratify any legislation passed as a result of the amendment. This type of reform has been popular in other states that are not constrained by similar constitutional provisions.

The history of sovereign immunity partially addresses the concept of punitive damages. No public entity or employee acting within the scope of employment is liable for punitive damages.[103] Punitive damages in wrongful death actions are generally supported by allowing juries to consider "mitigating or aggravating circumstances."[104] The only "reform" in Arizona came in 1989 when Arizona provided a government standard defense to FDA approved drugs and devices.[105]

The limited reform of damages in Arizona has revolved mainly around the periodic payments of awards. Under Arizona common-law principles, "plaintiffs in personal injury actions generally receive their damages for future economic injuries in lump sum awards."[106] The courts ordinarily discount awards to the current value of the future awards. In other words, they expect the plaintiff to invest the money at a reasonable rate of return so that the money actually

[99] Jimenez v. Sears, Roebuck and Co., 904 P.2d 861 (1995).
[100] Henderson, 570-571.
[101] Ibid., 572.
[102] Mayes, Kris and Pamela Manson, "House Kills Tort Reform Support Was 'Fading Quickly,'" The Arizona Republic, 2 April, 1996.
[103] Ariz. Rev. Stat. Ann. § 12-820.04.
[104] Ariz. Rev. Stat. Ann. § 12-613; see Boies v. Cole, 407 P.2d 917 (1965).
[105] American Tort Reform Association, Tort Reform Record, 31 December 1998, 16.
[106] Fox, 1095, citing Bruce Church v. Pontecorvo, 603 P.2d 932 (1979).

remitted to the plaintiff will eventually yield the award for future expenses. Arizona has, however, allowed periodic payments of future damages in medical malpractice cases.[107]

In 1993, the Arizona legislature attempted to extend periodic payments to all personal injury cases. Like so many other aspects of the Personal Injury Reform Act, this item was subject to popular review as part of the 1994 referendum (Proposition 301). Supporters of the measure argued that periodic payments would more accurately reflect how the plaintiff would have received income absent the injury. Additionally, the proposal would have shifted the burden of complex investment decisions to the defendant. Opponents, however, contended that periodic payments took away the power of plaintiffs to decide how they would like to receive payments and did not clearly protect the injured party when the defendant's insurer became insolvent. Arizona voters rejected Proposition 301 and, subsequently, rescinded this provision.[108] Thus, Arizona allows periodic payments only in medical malpractice cases.

COLLATERAL SOURCE DOCTRINE

Usually, the collateral source doctrine in Arizona prohibits the consideration of collateral payments from other sources to reduce the liability of a defendant. However, since 1976 in medical malpractice actions, information regarding other sources of payment has been admissible as evidence for jury consideration. It is important to recognize that a jury is not required to reduce an award based on other sources of payment.[109] However, the courts have found that the "option" to consider these alternative sources is constitutional.[110]

A section of The Personal Injury Reform Act of 1993 would have allowed collateral sources to be considered in all personal injury cases. Essentially, the law would have given juries the "option" of reducing awards when other sources of payment are available. This measure was included in Proposition 301 and thus subject to popular review. Opponents argued that, "Under the proposed law, a tortfeasor might not have to pay for the full extent of a plaintiff's injuries. Thus, the proposed law might have diminished the extent to which the current law deters unsafe conduct."[111] In addition, they pointed out that the measure might prevent citizens with overlapping insurance packages from receiving the "multiple recoveries" for which they paid. Supporters, however, felt that by preventing plaintiffs from receiving more then a "fair" compensation for damages the overall potential for liability and average insurance rates should decline. Regardless, the citizens of Arizona rejected Proposition 301 in 1994 and, as a result, repealed the abolishment of the collateral source doctrine.[112] The use of collateral sources is, nonetheless, still an option in medical malpractice suits. Since this approach has received judicial approval, it is likely that a broadly defined doctrine could withstand further judicial review.

[107] Ariz. Rev. Stat. Ann. § 12-582.
[108] Fox, 1076.
[109] Ariz. Rev. Stat. Ann. § 12-565.
[110] Eastin v. Broomfield, 570 P.2d 744 (1977).
[111] Fox, 1084.
[112] Ibid., 1076.

STATUTES OF REPOSE

A **statute of repose** is related to a statute of limitations. Statutes of limitations commonly govern the time a plaintiff has to file a claim after they discover an injury. A statute of repose is a limit on the time that a person has to discover an injury or become injured.[113] So, for instance, a statute of limitation might state that someone can sue for a fixed amount of time after they have an automobile accident caused by the faulty design, construction or maintenance of a road. In contrast, a statute of repose might assert that a plaintiff couldn't sue unless the injury happened within a specified period after the construction of a roadway.

In Arizona, statutes of repose have not fared well. The State Supreme Court, in 1993, declared legislation that provided a twelve-year limit regarding product liability actions to be unconstitutional.[114] The law, they argued, rescinded an action protected under the constitution (Section 6 of Article XVIII).[115] That same year, Arizona legislated a new general statute of repose of twelve years. Proponents argued that a twelve-year limit placed a reasonable check on liability that would likely lead insurance companies to reduce their premiums. Conversely, opponents felt that we might severely undermine the rights of minors and the mentally ill to sue, particularly when the legal guardian and the potential defendant are the same person. For instance, a legal guardian who is guilty of abusive actions might not be willing to file suit on behalf of the child or mentally ill person.[116] If no one sues within twelve years of the injury, the guardian is free from liability even though he was the one that caused the injury and prevented the lawsuit from being filed. In this instance, there was no judicial review since the 1994 referendum (Proposition 301) nullified it.[117] Currently, Arizona has no statute of repose in effect.[118]

SUBROGATION

In Arizona, there can be no subrogation or assignment in personal injury cases unless a statute authorizes it. Simply, subrogation is when you pay off someone's debt and then attempt to collect the money from the debtor yourself. It is usually an issue when insurance policies are involved in personal injury cases. Insurance companies want to recover what they paid the plaintiff for his injuries either through the plaintiff's award or by being assigned the right to sue the defendant directly. In 1978, the Arizona courts addressed this issue twice with the cases Allstate Insurance Co. v. Druke[119] and Hall v. Olague.[120] In both instances the court stated that they would not allow subrogation or assignment in personal injury cases.

In the 1993 Personal Injury Reform Act, the Arizona legislature moved to overturn the common law rule of subrogation. Essentially, this law would allow insurers, hospitals, medical service corporations, and health care services organizations to include provisions in policies that

[113] Black's Law Dictionary, 6th ed., s.v. "Statute."
[114] The statute was codified as Ariz. Rev. Stat. Ann. § 12-551 until it was declared as unconstitutional.
[115] Ibid., 628-629.
[116] Fox, 1077-1081.
[117] Ibid., 1076.
[118] Ibid., 1077.
[119] Allstate Insurance Co. v. Druke, 576 P.2d 489 (1978).
[120] Hall v. Olague, 579 P.2d 577 (1978).

would allow the organizations to recover payments by suing defendants or placing liens on damages awarded to plaintiffs. Again, this item was placed before the voters as part of the 1994 referendum. Supporters claimed that by limiting liability Arizonans would have enjoyed lower insurance rates. Opponents, however, argued that the measure went too far in restricting a plaintiff's right to recover damages. Voters in Arizona rejected Proposition 301 and, subsequently, passed up the opportunity to overturn the common law rule of subrogation.[121] However, one Arizona Statute does allow insurance companies to "subrogate and sue for reimbursement of the total amount of the payments in the name of the insured against any uninsured motorist responsible for the damages to the insured."[122]

NO-FAULT INSURANCE

No-fault auto insurance generates tort reform by eliminating the need for injured parties to sue for damages. In return for giving up the right to litigate, people would pay lower insurance premiums and deal exclusively with their insurance company. In addition, this reform would address the current incapacity of the system to compensate automobile accident victims in a timely and fair manner. Opponents of no-fault insurance argue that lower premiums are not worth giving up the unlimited right to sue.

In 1990, a no-fault measure was placed on the ballot (Proposition 203) that guaranteed a premium reduction of 20 percent. This proposed reduction was to be based upon the insurer's average premium in effect on July 1, 1990. Additionally, the law required insurance companies to pay claims within thirty days or pay an interest penalty. Finally, the reform would prohibit insurance companies from increasing rates because of claims filed when the policyholder was not at fault.[123] The battle was heated, with proponents (insurance companies) and opponents (Arizona Trial Lawyers Association and FAIR) spending well over six million dollars in the effort to influence public opinion. Voters in Arizona rejected the initiative by about a four to one margin and expressed strong support for the unlimited right to bring suit against a person at fault in an accident.[124] Proponents of no-fault insurance have not attempted this type of reform again.

Summary

In the last twenty-five years in Arizona, the judicial, legislative, and executive branches have attempted or effected significant tort reforms. In the 1960s, for example, the principal of sovereign of immunity was judicially abolished. This retraction, however, was later followed by a legislative reclaiming of certain exceptions to governmental liability. Arizona has also instituted a "pure" comparative negligence scheme where a plaintiff may recover damages even when they are more than 50% at fault. The abolition of joint and several liability complements the comparative negligence system. In this way, Arizona is a state where people pay and receive damages based solely upon their percentage of fault.

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[121] Fox, 1084-1090.
[122] ARS 20-259.01 (I).
[123] Marcia Sielaff, "Auto Insurance: How Does a Voter Sort Through the Confusion on the Ballot?" The Phoenix Gazette, 1 November, 1990, A17.
[124] Jack Lavelle and Glen Creno, "Expensive Campaigns to Alter Auto Insurance Fail to Sway Electorate, No-Fault, Rollback Propositions Defeated," The Phoenix Gazette, 7 November, 1990, A6.

More recent attempts at tort reform in Arizona have been less successful. For example, the courts declared the statute of repose unconstitutional. Later, the sweeping Personal Injury Reform Act of 1993 was largely overturned by popular vote in the 1994 referendum. Additionally, the state adopted new legislation in 1996 that expanded the need for an affidavit-of-merit when suing professionals like funeral directors, dentists, and nurses. A previous law provided the same protection to architects, engineers, and others. This legislation reforms tort law by making it difficult to sue professionals without an affidavit-of-merit from an expert in the field explaining how the defendant's action caused damage. However, in 1997, with *AA Mechanical v. Superior Court and Devenney Architects v. Superior Court*, the judiciary found that affidavits-of-merit were unconstitutional because they limited a plaintiff's right to sue. According to the Appellate Judge who wrote the decision affecting both cases, "the right to bring an action to recover for damages is a fundamental right. . . Any statute that infringes on that right is subject to strict scrutiny."[125] These decisions clearly illustrate that the Arizona courts will not support any law that even slightly narrows a citizen's right to sue and that a constitutional amendment must be given serious consideration when considering a wide range of reforms.

In hindsight, it is quite possible that the Arizona legislature was too ambitious in 1993. Perhaps Arizona voters would have supported a more limited, less sweeping attempt at reform. One general act that radically revises the entire tort system may be desirable, but politically naive. Such a measure is bound to mobilize the well-endowed and well-organized legal interests (Arizona Trial Lawyers) that benefit from existing arrangements. In addition, aggressive reforms ensure that many voters will feel that at least one aspect of the effort conflicts with their own self-interest and/or their conception of what is just. Adversaries will, of course, be quick to recognize such strategic weaknesses and use them to mobilize opposition. Subsequently, tort reform in Arizona may necessarily involve patience and the incremental implementation of targeted measures.

[125] Howard Fischer, "Tort Reformers Receive Setback," The Arizona Business Gazette, 4 December, 1997,

Table 3-2. Timeline of Major Tort Reform Events

DATE	ENTITY	EVENT	IMPLICATIONS
1912	State of Arizona	Arizona is granted statehood. The adopted Constitution contains three articles that forbid the people or lawmakers from restricting a person's right to sue for damages or what they can recover.	These articles severely limit any future tort reform proposals.
1963	Arizona Supreme Court	*Stone v. Arizona Highway Commission*	Principle of Sovereign Immunity abolished.
1971	Arizona Legislature	Immunity reinstated for discretionary functions.	Legislature reclaims limited sovereign immunity.
1973	Arizona Legislature	Immunity reinstated when public employees rely upon a law that would later be declared unconstitutional.	Legislature further reclaims limited sovereign immunity.
1978	Arizona Court of Appeals	*Allstate Insurance v. Druke* *Hall v. Olague*	As a result, subrogation is not allowed without statutory authorization.
1984	Arizona Legislature	New legislation limits liability of public entities and public employees in some instances.	The Legislature further reclaims sovereign immunity as absolute in some instances.
1986	Arizona Voters	Proposition 103 defeated.	Constitutional Amendment that would have allowed legislation yielding damage caps and limits on attorneys' fees.
1990	Arizona Voters	Propositions 105 and 203 defeated.	Prop 105 would have amended the constitution so that a citizen's right to sue and receive damages might be restricted. Prop 203 would have allowed motorists to choose no-fault insurance.
1993	Arizona Legislature	The Personal Injury Reform Act (Sometimes referred to as The Arizona Tort Reform Act.)	Sweeping tort reform legislation. (See Table 3-1.)
1994	Arizona Voters	Propositions 103 and 301 defeated.	Prop. 103 would have amended the constitution so that a citizen's right to sue and receive damages might be restricted. The defeat of Prop. 301 overturned the bulk of The Personal Injury Reform Act of 1993.

CHAPTER FOUR: OPTIONS FOR TORT REFORM IN ARIZONA

The purpose of this chapter is to examine a range of options for tort reform in Arizona. We begin by discussing a possible constitutional amendment and then move on to analyze sovereign immunity, comparative negligence, joint and several liability, collateral sources doctrine, attorneys' fees, expert witnesses, caps on damages, no fault insurance, subrogation reform, and statutes of repose. For each option, we assess legal and political concerns that might influence the measure's potential to be signed into law or withstand judicial and/or popular review.

Reform Option 1: AN ARIZONA CONSTITUTIONAL AMENDMENT

One way to reform the tort liability system is to amend the Arizona Constitution. As discussed, Arizona has three constitutional provisions that address limitations on suits: Sections 23 and 31 of Article II and Section 6 of Article XVIII. Courts in Arizona have interpreted these provisions to create an abrogation prohibition that applies to all cases.[126] In effect, the governing interpretation of these sections offers Arizonans an almost unlimited right to sue and impedes the public and lawmakers from restricting the amount of damages recoverable in a suit. Since the Court is unlikely to overturn precedent in this area and legislative action alone is insufficient; we require an amendment to change the way we apply the abrogation prohibition in Arizona.

However, a constitutional amendment is unlikely to withstand popular review. In 1986, 1990, and 1994 voters in Arizona were given the chance to ratify amendments that would have enabled policymakers to restrict a citizen's right to sue and recover damages. On each occasion, voters rejected the propositions and suggested that they are generally unwilling to support a removal of protection against the abrogation of tort actions.[127] Conventional wisdom would suggest, then, that any additional attempts to modify the constitution are likely to fail. Nonetheless, if we did manage to amend the constitution, legal challenges would be unlikely. The new provision would be the law and the courts of Arizona would be compelled to interpret cases applying the new standard.

[126] See, e.g., Alabama's Freight Co. v. Hunt, 242 P. 658 (1926); Alabama Freight Lines v. Therenot, 204 P.2d 1050 (1949); Ruth v. Industrial Commission, 490 P.2d 828 (1971); Barrio v. San Manuel Division Hosp., 692 P.2d 280 (1984).

[127] Jona Goldschmidt, "Arizona Courts, the State Constitution, and Public Policy," in Politics in Public Policy in Arizona, Ed. Zachary Smith. Westport, CT: Praeger, 76.

Reform Option 2: SOVEREIGN IMMUNITY LEGISLATION

While a constitutional amendment may have the greatest impact, the area of sovereign immunity might accommodate the greatest number of alternatives. These options could help achieve reform by allowing for the development of legislative action(s) that would both protect the Arizona Department of Transportation and have popular appeal. Possibilities for reform include a revival of the 1993 qualified immunity measure, weather immunity, or actual notice requirements.

First, a revival of the 1993 qualified immunity statute is one possibility. Under the 1993 law, we gave governmental entities qualified immunity "against claims for injuries that resulted from the operation or maintenance of completed highways, roads, streets, right-of-ways, or bridges."[128] With this legislation, a plaintiff could not recover from a governmental entity for injuries unless they proved that the entity intentionally caused the injury or was grossly negligent.[129] This type of reform would likely lead to a reduction of governmental liability that would possibly save taxpayers' money.

Nevertheless, this was one of the many measures that voters in Arizona overturned as part of the 1994 referendum. One could argue, of course, that if voters had evaluated this item separate from the others it might have survived. Yet one simple fact makes this scenario unlikely. The public has shown little support for reforms that place "unreasonable" restraints on a person's right to sue for damages. Since this measure sets a high standard for recovery, opponents could easily frame it in the most undesirable terms. In fact, opponents are likely to argue that this standard might actually preclude meritorious suits. Subsequently, it is improbable that such legislation could survive popular review.

Second, we could consider a weather immunity. Such a reform would generate protection from losses caused by "snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the snow or ice thereon is affirmatively caused by a negligent act of the employee."[130] Considering the severe weather possible throughout Arizona, such a provision might significantly reduce liability. Liability could still result if an excessive amount of time passes before snow or ice is removed since that could be construed as negligence. However, injuries caused by snow and ice while a good faith attempt is being made to remove such hazards would no longer generate liability. This reform has a strong commonsense element and, subsequently, a degree of public appeal not present in other measures.

Finally, we could enact an "actual notice" provision as a segment of state sovereign immunity. Under such a provision, the government is required to have actual written notice of a defect or hazard before it can be held liable for injuries caused by such conditions. For example, a governmental entity could not be held liable for potholes and sinkholes that it did not receive

[128] Carey J. Fox, "The Arizona Tort Reform Act: Voters Reject Widespread Reform Measures," Arizona State Law Journal 26, no. 4 (1994): 1091.
[129] Ibid.
[130] National Cooperative Highway Research Program, Synthesis of Highway Practice 206, Managing Highway Tort Liability (Washington, D.C.: National Academy Press, 1994), 11.

written communications about.[131] Governmental entities could save money by only having to respond once a condition is known to them instead of increasing insurance coverage to protect them from all unknown dangers that may injure a person before they can discover the problem and remedy it. Simply, once a governmental entity has notice, it is responsible for correcting a defect or hazard. This type of reform would be difficult to frame as unreasonable and, like the weather immunity, seems commonsensical.

From a legal perspective, judicial precedent suggests the above reforms would not be overturned by the courts. After the Arizona Supreme Court abrogated sovereign immunity in Stone, the state was open to all suits. Yet within a few years, the Arizona legislature revitalized sovereign immunity in certain areas. The courts have not rejected these laws. Here, it seems that sovereign immunity either trumps the "abrogation prohibition" or it is generally not thought to apply in the sovereign immunity area. Subsequently, if the state implements the above reforms, they will simply represent a retraction by the state of the permission to be sued in those circumstances. However, only the weather immunity and actual notice provision are likely to survive popular review.

Reform Option 3: Comparative Negligence and Joint and Several Liability Legislation

As discussed, Arizona currently follows the "pure" comparative negligence standard where a plaintiff can recover damages even when they are more than fifty percent at fault. This standard has been in effect since Arizona adopted a modified version of the Uniform Contribution Among Tortfeasors Act in 1984.[132] As contributory negligence has fallen out of favor as an overly harsh principle, the only reasonable attempt at reform is to revive the 1993 tort reform that disallowed recovery if the plaintiff were fifty percent or more at fault. That reform was labeled a "modified" comparative negligence standard and it amended joint and several liability only as necessary to comply with the new standard for recovery.[133]

The policy arguments behind the change from "pure" to "modified" comparative negligence rely upon the reduction of litigation. Plaintiffs who are somewhat at fault for their own injuries would be more likely to settle rather than go to court and conceivably recover nothing. In addition, a "modified' version of comparative negligence might even encourage more equitable decisions from the courts. In this case, plaintiffs who are actually more at fault than a defendant might not recover at all.[134] However, it is also possible that this measure would discourage plaintiffs with legitimate claims from bringing suit. Attorneys may also be less likely to represent plaintiffs who are responsible for their own injuries in some way. Moreover, we can see pure comparative negligence as the most equitable because it "apportions damages according to the relative fault of the parties."[135] Simply, barring recovery for a plaintiff who is ninety-nine percent at fault may seem fair, but barring recovery for a plaintiff who is only fifty-one percent at fault may seem less than fair.[136]

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[131] Ibid.
[132] Ariz. Rev. Stat. Ann. § 12-2501-2509, cited in Fox, 1093.
[133] Fox, 1904.
[134] Ibid., 1095.
[135] Ibid.
[136] Ibid.

Unlike the idea of reviving qualified immunity reform, restoring "modified" comparative negligence may be short lived because it forces a total reevaluation of what cases should be brought to court. If a plaintiff is possibly fifty percent or more at fault, he might find it impossible to find an attorney who will take his case. With the 1994 referendum, Arizona voters rejected such a revision of comparative negligence. Because of the consequences this type of reform has on all categories of negligence suits, an interested party would easily mobilize opposition to the reform.

In a legal sense, if "modified" comparative negligence survived public scrutiny, it is not likely to be judicially reversed. The 1984 modification of comparative negligence was not successfully challenged. Most likely, this type of reform would not be challenged on constitutional grounds.

Reform Option 4: COLLATERAL SOURCES DOCTRINE REFORM

The collateral source doctrine governs what information we can give to the jury regarding other means for plaintiff damage recovery. Arizona has abolished the collateral source doctrine in medical malpractice cases so that it allows juries the opportunity to consider other sources of payment when developing awards. However, there is no requirement that the jury reduce the award based upon these other sources. The Personal Injury Reform Act of 1993 successfully expanded this doctrine to all personal injury cases before the 1994 referendum repealed it.

Within this context, two reforms are possible. First, we can again attempt to expand the present medical malpractice rule to all personal injury actions. Second, we could require juries to deduct collateral sources of income from damage awards. In support of expanding the current medical malpractice rule, allowing evidence of other sources of payment may reduce plaintiff recovery for injuries. By reducing liability, insurance premiums are likely to decrease.[137] On the other hand, the 1993 reform did not mandate that insurance companies lower their premiums. One way to accrue public support for such a reform would be to merge required premium reductions with collateral sources reform. Requiring juries to reduce damage awards based upon collateral sources is likely to reduce premiums even more as the jury could not ignore the collateral sources. Theoretically, this measure would automatically reduce awards.

Under Arizona law, giving juries the opportunity to consider collateral sources of payment when developing awards is constitutional.[138] The Arizona Supreme Court specifically ruled that it did not violate Section 31 of Article II or Section 6 of Article XVIII.[139] Therefore, a statute expanding the medical malpractice rule to all personal injury cases is likely to survive judicial review. However, if the reform requires a jury to reduce awards, the courts will most likely declare the reform unconstitutional. Ohio, another state that has a constitutional provision restricting the power of the legislature to limit damages in personal injury actions, has recently declared such a statute unconstitutional.[140] Given the constitutional similarities, the Ohio ruling increases the likelihood that such a reform would not withstand judicial scrutiny in Arizona.

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[137] Ibid., 1083.
[138] Eastin v. Broomfield, 570 P.2d 744, 752-753 (1977).
[139] Ibid., 753.
[140] Fox, 1084, note 49, citing Henderson, 538, note 19.

Reform Option 5: Reform of Attorney Fees

Another option for tort reform involves attorney fees. In particular, people interested in reducing liability attack contingent fees for contributing to the problems in the liability system. A contingency fee is when a lawyer only receives payment, usually a set percentage of damages, upon victory. Many observers feel this approach creates an incentive for attorneys to seek higher awards. Reforms regarding fees either require hourly rates in certain situations, attempt to cap the percentage of the damages lawyers can claim, or do both.

Standard contingent fees in tort cases may end up costing a successful plaintiff thirty-three to 40 percent of the final award or settlement.[141] Attorneys presumably charge such a large percentage to offset their risk if they lose the case. Early offers of settlement may come "at a point where the plaintiff's lawyer may have exerted little effort, incurred minimal cost, and risked virtually nothing."[142] Moreover, opponents often attack this nonpayment risk because no one requires attorneys to take cases that they do not believe they can win. Therefore, one suggested reform is that for sixty days after filing a suit, a defendant can settle and the plaintiff's attorney would be limited to "capped hourly charges."[143] Such a provision is likely to inspire political support especially following the huge fees collected by attorneys involved in the tobacco settlements.

Nevertheless, attorneys will vigorously challenge such a law in the courts and, if necessary, by referendum. Lawyers would argue that contingent fees exist for a specific purpose–to ensure plaintiffs without money access to courts. In other words, tort reform directed at contingency fees will incur considerable legal challenges by attorneys. Finally, we must remember that the Arizona Trial Lawyers Association spearheaded the successful 1986, 1990 and 1994 popular rejections of tort reform efforts.

Reform Option 6: Expert Witness Reform

Expert witnesses are often involved in personal injury cases to substantiate arguments that require scientific or technical support. For example, if a plaintiff questioned the design of a highway in court, both sides would call engineers to support arguments involving design reliability. Furthermore, expert witnesses "are entitled to witness fees, the amount of which is subject to arrangement between them and the attorneys who call them to testify."[144] The fact that the expert is paid is not a secret and "it can be expected that the [opposing] attorney will make the point that the expert has been retained by one side of the case, with the implication that he or she is biased."[145] Also, contingent fees for expert witnesses are "fundamentally against public policy and therefore invalid and unenforceable in a court of law."[146]

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[141] Arizona Transportation Research Center, Document Review (December 1995): 5, discussing Michael J. Horowitz, The Case for Fundamental Tort Reform (Indianapolis: Hudson Institute, 1995), HE333.H6.
[142] Arizona Transportation Research Center, 5.
[143] Ibid.
[144] Sheldon I. Pivnik, "Legal Liability in Traffic Engineering," chap. 27 in Transportation and Traffic Engineering Handbook (Washington, D.C.: Institute of Transportation Engineers, 1982): 835-836.
[145] Ibid., 836.
[146] Ibid.

Regardless, expert witnesses may still be interested in the outcome of the cases in which they participate. Over the years, the expert witness has evolved into a business where doctors, engineers, or other "experts" earn an inordinate percentage or even all of their yearly income from testifying. To do so, experts must be worth hiring repeatedly, often by the same attorneys. This situation can instill an interest in the outcome of the litigation that conflicts with an expert's professional obligation to provide unbiased testimony. The rules of evidence are the main mechanism in the court to combat such bias. As stated above, rules of evidence openly allow the fact that they are paying the expert to be used to impeach the expert, or imply that the expert is biased. On the other hand, single instances of payment may not have an impact on the jury as they evaluate the expert witness' testimony. Therefore, a possible tort reform would be to publish the history of testimony by expert witnesses.

Judges and juries could use a history of expert testimony in many ways. First, this history could keep track of an expert's position in prior testimony. Thus, a jury would have the chance to consider any discrepancies in an expert's testimony. Second, a jury could consider the number of times an expert has testified for a specific attorney. Third, the jury can consider the percentage of income an "expert" earns from his testimony. Obviously, an accurate history of expert testimony would greatly enhance the judge or jury's ability to evaluate the credibility of any given professional witness.

On the judicial front, there is not likely to be any significant legal opposition to a reform that makes the history of an expert's testimony part of discovery.

REFORM OPTION 7: CAPS ON DAMAGES

This is a very popular choice for tort reform across the nation. Such reforms limit the amount of punitive damages recoverable, the amount of "non-economic" damages recoverable, or both. No such reform is possible in Arizona, nor is any such reform necessary to protect the Department of Transportation.

Under Arizona law, we allow punitive damages in personal injury cases.[147] As a state agency, the Department of Transportation is not liable for punitive damages because the state "cannot be held liable for punitive damages in absence of specific statutory authorization."[148] Therefore, there is no need to encourage legislative action in this area.

The other version of a cap, "non-economic" damages, could apply to ADOT. However, it is clearly unconstitutional in Arizona under both Section 31 of Article II and Section 6 of Article XVIII.[149] Therefore, although it is a popular version of tort reform, caps on damages are not a reasonable option in Arizona.

[147] Ariz. Rev. Stat. Ann. § 12-613.
[148] Welch v. McClure, 598 P.2d 980 (1979).
[149] ARIZ. CONST. art. II, § 31; art. XVIII, § 6.

Reform Option 8: NO FAULT INSURANCE LEGISLATION

The basic principle underlying no-fault insurance is that consumers will trade their right to sue for lower insurance premiums. Instead of a suit against another party, the plaintiff simply collects damages from their own insurance company. If the injured party has damages that exceed their insurance, they can still sue for the uncollected damages.[150] In this way, we handle the injuries outside the tort system unless they are severe enough to surpass the insurance coverage. Subsequently, we generally avoid many of the costs associated with negligence trials (attorneys' fees, expert witnesses, etc.).

In 1990, a no-fault insurance measure was placed on the ballot (Proposition 203) as a referendum. As with all attempts in Arizona to restrict a person's right to sue, voters rejected this reform effort.[151] Even if citizens were allowed to choose between a traditional plan and a no-fault policy, the constitution would have to be amended to allow a restriction on the right to sue. An amendment to the constitution is, of course, unlikely to occur.

Reform Option 9: SUBROGATION REFORM

Currently, Arizona prohibits the subrogation of personal injury claims unless they are authorized by statute.[152] While a limited form of subrogation does exist for insurance companies, the Arizona courts refuse to enforce subrogation clauses in other arenas.[153] The Personal Injury Reform Act of 1993 included a measure that would allow insurers, hospitals, medical service corporations, and health care service organizations to include provisions in policies that would allow the organizations to recover payments by suing defendants or placing liens on damages awarded to plaintiffs. Policyholders still had the option of purchasing insurance policies without subrogation clauses if they wished. This item was subject to popular review in 1994 and was subsequently overturned. A revival of the 1993 attempt to allow subrogation through statutory authorization is a possible area for tort reform.

Subrogation is prohibited in Arizona unless a statute authorizes it. Therefore, if the legislature passes a statute that does authorize more general form of subrogation, there is no legal basis for challenge in the courts. However, it is not clear whether a measure mandating such actions would withstand popular review. The most viable approach on this front is to pursue legislation that allows people to choose between policies with subrogation clauses and those without one.

Reform Option 10: STATUTES OF REPOSE LEGISLATION

Another option for tort reform in Arizona is a statute of repose. The Personal Injury Reform Act of 1993 included a twelve-year statute of repose that applied "if no other statute of

[150] "Auto Insurance Change Gets Support in Congress," Lawyer's Weekly USA (Internet Archives), 11 August 1997, 97 LWUSA 642.
[151] Henderson, 537, note 16.
[152] Allstate Insurance Co. v. Druke, 576 P.2d 489 (1978); Hall v. Olague, 579 P.2d 577 (1978).
[153] Fox, 1084-1085.

limitations applied or if the applicable statute of limitations was tolled."[154] This reform would likely reduce liability and presumably insurance premiums would drop. As discussed in Chapter 3, however, opponents felt that the measure would unfairly bar certain injured parties from suing for damages. For instance, the legal guardian of a minor could very well be the tortfeasor. In such a case, the legal guardian is the only one who can sue himself. If no one sues within twelve years of the injury, the guardian is free from liability although he was the one that caused the injury and prevented the lawsuit from being filed.[155] If we could exclude such fraudulent or wrongful conduct from the statute of repose, then it is likely to secure greater support.

However, even if a statute of repose is successfully signed into law, it is still on shaky legal ground. In 1993, the courts declared the twelve-year statute of repose in effect in product liability litigation unconstitutional as an abrogation of a basis for suit for personal injuries.[156] Based upon this case, any other statute of repose is unlikely to survive judicial review.

Conclusion

The discussion above illustrates the limitations on reform possibilities in Arizona. Many measures would not withstand judicial and/or public scrutiny. First, recent history tells us that an attempt to amend the constitution in pursuit of tort reform is unlikely to succeed. Second, because it radically revises the liability system, comparative negligence reform would mobilize opposition forces and suffer a quick defeat. Third, a reform of attorneys' fees is a very volatile area and subject to brutal legal challenges. Finally, a cap on damages, a statute of repose, and no-fault insurance are not viable options because they arguably violate the state constitution.

However, the discussion above also provides us with a range of reform options that might survive judicial and popular review. To begin, all of the sovereign immunity reforms are legally sound and the weather and actual notice provisions may resonate with the public. In addition, we could reform collateral sources by expanding the legally sound medical malpractice rule to all personal injury cases. Also, expert witnesses could be regulated by using a history of their testimony to display their bias in court. Finally, legislation that gave people the option of choosing insurance policies with or without a subrogation clause is likely to survive the courts and have a good deal of popular appeal. We examine the attitudes key policymakers have toward these reform efforts in the next chapter to uncover which reforms they feel are politically feasible.

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[154] Ibid., 1078.
[155] Ibid.
156[156] Hazine v. Montgomery Elevator Co., 861 P.2d 625 (1993).

CHAPTER FIVE: POLITICAL FEASIBILITY FOR TORT REFORM IN ARIZONA

In order to discover the possibility of the above tort reform options actually becoming law, we discussed them with fourteen members of the Arizona legislature**.** The sample for this survey included the members of the judiciary committees in both the Arizona Senate and House of Representatives, the Speaker of the House of Representatives, the majority and minority leaders in the House of Representatives, the majority and minority leaders of the Senate, and the Governor's office**.** The legislators were chosen for both their positions of leadership in their party and/or the Arizona Legislature, and by the likelihood that their committee membership would result in their involvement with any legislation directed at tort reform. One interview was conducted with a high-ranking member of a legislator's staff. This was done to ensure participation from senior leadership in the Arizona Legislature. We were unable to contact seven other legislators we had chosen to interview for this study. Additionally, a spokesperson for the Arizona Governor's office stated that it might be improper for the Governor's Office to respond. However, we do believe that our respondents portray an accurate political gauge of the political feasibility for tort reform in Arizona.

In our discussions with the legislators, we utilized a technique that is often called "unstructured interviewing." While we did employ a formal survey instrument (see Appendix A), we did not conduct the interviews in what might be termed a "scientific manner." In other words, legislators were given any additional information that the interviewer felt was necessary to gain an informed response to a question. Legislators were also allowed to voice their own questions or concerns about tort reform, the survey, or any other topic that they felt was necessary for the researchers to adequately understand the political issues surrounding tort reform in Arizona. This methodology allowed us to gain an understanding of the political feasibility for tort reform in Arizona from the viewpoint of political leaders in Arizona. In this effort, we talked with nine Representatives and five Senators, and ten Republicans and four Democrats. Several of the legislators we interviewed were women.

In general, the legislators we surveyed expressed a belief that tort reform was not likely to occur in Arizona. One respondent stated; "In the short term, no reforms are likely to pass. At this point, there is no spokesperson." Another legislator commented; "Tort reform is unlikely to occur in Arizona." However, one legislator did comment that for tort reform to ever be possible in Arizona; "Incremental or more limited reforms must be pursued." However, our interviews did not discover overwhelming support for any of the reforms we questioned these leaders about. The following table (Table 5-1) provides the relevant information we gathered on the political feasibility of tort reform in Arizona. Appendix A, the annotated questionnaire, provides all of the information we collected from the political leadership in Arizona on these reforms.

Table 5-1. Political Feasibility for Tort Reform in Arizona

RANK	REFORM MEASURE	STRENGTH	WEAKNESS	POLITICAL FEASIBILITY
1.	Expert Witness History	Likely to pass Legislature and receive voter approval.	Close call on judicial review.	**Good**
2.	Weather Reform	Good chance to pass the legislature.	Close call with the voters.	**Fair**
3.	Collateral Sources	Might squeeze through judicial review.	Unlikely to pass the legislature or voters.	**Poor**
4.	Statute of Repose	Too close to call with legislature and on judicial review.	Unlikely to pass the voters.	**Poor**
5.	Expert Witness Compensation	A longshot on judicial review and voter approval.	Unlikely to pass the legislature.	**Poor**
6.	Attorney Fee Cap	Too close to call with the voters.	Won't pass the legislature.	**Poor**
7.	Subrogation	Might squeeze through judicial review.	Tough sell to the legislature and voters.	**Poor**
8.	No-fault Insurance	Could be close on judicial review.	Won't pass the legislature or voters.	**Poor**
9.	Comparative Negligence	None	Won't pass the legislature or voters.	**Poor**
10.	Constitutional Amendment	Won't need judicial review.	Won't pass the legislature or voters.	**Poor**
11.	Damage Cap	None	Must be preceded by an amendment to the Constitution.	**Poor**

Political Feasibility Scale:
Excellent: Very likely to occur.
Good: Might occur under the right political conditions.
Fair: Unlikely to occur.
Poor: Extremely unlikely to occur.

As the above table illustrates, only one reform option received a rating of "good" for its likelihood to occur in the state of Arizona. One other option received a rating of "fair." The remaining nine options received a rating of "poor." Simply, we feel that, based on our interviews, only one reform option might occur and only then under the right political circumstances. This one reform would need a strong sponsor or strong backing from leadership in order to have a chance to pass the legislature and the voters. We view the other reforms as either unlikely or extremely unlikely to occur in Arizona.

Overall, the legislators view publishing a history of expert witness testimony as having the best chance to occur in Arizona. Eight legislators, or 57% of those surveyed, believed that this option would pass the legislature. Nine legislators (64%) said that this reform would gain popular approval from the general public. However, the respondents were split on the likelihood that this measure would pass judicial scrutiny. Seven legislators (50%) believed that it was "likely to pass" judicial review, two (14%) legislators felt that it was "too close to call," and four (29%) political leaders saw this reform as "unlikely to pass" judicial review. Because the political leaders we surveyed expressed concern about the ability of this measure to withstand judicial review, and because they also felt that tort reform was, in general, without support in the legislature or public, we rated this option as having a "good" rather than an "excellent" chance to

occur in Arizona. If the political climate in Arizona changes, this might be the first reform measure attempted.

Legislation aimed at tort reform through strengthening one aspect of sovereign immunity ranked second on our list of options when we ranked them by their likeliness to pass the legislature and voters, and, at the same time, withstand judicial review. However, protecting public entities from liability or losses caused by inclement weather when they are making a "good faith" effort to remove such hazards only received a rating of "fair" on our political feasibility scale. While seven (50%) respondents felt that this measure would pass the legislature, only five (36%) of these political leaders believed that the voting public would support it. Additionally, eight of those surveyed said that this measure was "too close to call" (29%) or was "unlikely to pass" (29%) judicial review. However, our research suggests that this reform might actually withstand judicial review. In our view, the most important political hurdle would entail convincing the voting public that it would be in their best interest to vote for this reform. In addition, one political leader also reminds us that we would need to "redefine" the good faith clause. In the future, if the political climate regarding tort reform changes in Arizona, this option might actually have a much better chance at passing both the legislature and the voting public.

Perhaps the most important reform measure we questioned these legislators about concerned amending the constitution. According to one political leader: "Very few reforms are possible without an amendment." However, none of the political leaders we talked to felt that this measure could pass either the legislature or the voting public. Three legislators felt that that it was "too close to call" in the legislature and one believed that it was "too close to call" with the voting public. The rest believed that an amendment was "unlikely to pass" either the legislature or the public. It seems obvious that an amendment to the Arizona constitution directed at tort reform is not likely to occur in the near future.

Similarly, a cap on damage awards, the option that most often comes to mind when we think of tort reform, does not appear politically feasible either. Only one legislator stated that a cap on damages could pass the voting public. None of our respondents stated that this measure would pass the legislature. Again, a cap on damage awards is not politically feasible at this time. This is perhaps the least likely of all the options considered to occur because it could not happen without an amendment to the Arizona Constitution.

Conclusion

As stated previously, tort reform is currently a tough sell in Arizona. The political climate does not support the most obvious measures that are usually employed in efforts aimed at tort reform. The most politically feasible approach to tort reform appears to be incremental measures that are not commonly defined as tort reform. A reform aimed at expert witnesses or sovereign immunity seem to be the only politically feasible options, and these would need to be initiated under the best political circumstances in order to be successful.

APPENDIX A: ANNOTATED QUESTIONNAIRE

This appendix contains the annotated questionnaire. It is important to note that the fielding of this survey was not strictly "scientific." The respondents were given prompts and more information when necessary to ensure that their comments were as fully informed as possible. Each question had fourteen respondents.

1. One reform option is to amend the constitution so that a citizen's right to sue and receive damages might be restricted.

Would you rate an amendment's chances as **1**–Likely to pass, **2**–Too close to call, or **3**–Unlikely to pass?

Q1.	**Likely to pass**	**Too close to call**	**Unlikely to pass**	**Refused**	**TOTAL**
The Legislature	--	21%	79%	--	100%
Judicial Review	21%	7%	14%	57%	99%*
Voter approval	--	7%	93%	--	100%
TOTAL PERCENTAGE**	7%	12%	62%	19%	100%

* Totals vary due to the rounding of percentages.

**This figure represents the combination of responses to whether this option would pass the Legislature, judicial review, and voters.

Additional Comments:

1. Past attempts at amendments were too broad.
2. Very few reforms are possible without an amendment.

NOTES: These comments highlight the political nature of tort reform. Many previous proponents of tort reform now advocate an incremental approach to tort reform in the belief that previous attempts were too broad and, thus, an easy target for groups opposed to reform. However, as the second comment makes clear, traditional forms of tort reform are not likely without a constitutional amendment.

2. A second reform option would protect public entities from liability for injuries or losses caused by snow, ice or other comparable conditions as long as a good faith effort to remove such hazards is underway.

Q2.	Likely to pass	Too close to call	Unlikely to pass	Refused	TOTAL
The Legislature	50%	14%	36%	--	100%
Judicial Review	43%	29%	29%	--	101%
Voter approval	36%	14%	50%	--	100%
TOTAL PERCENTAGE	43%	19%	38%	--	100%

Additional Comments:

1. Overall, unlikely to pass.
2. The good faith clause would need to be redefined.

NOTES: While the legislature might be convinced to pass this reform option, one respondent pointed out that it was not likely to pass the voters – if it first passed judicial review. Currently, the public, according to several legislators, is unwilling to relinquish any right to sue. However, if this amendment did eventually become law, another legislator forewarned that the term "good faith" would need to be defined in a manner that was precise enough to preclude suits testing the definition.

3. A third reform option would prohibit a lawsuit if the plaintiff were fifty percent or more at fault for their own injuries. (Modified version of Comparative Negligence)

Q3.	Likely to pass	Too close to call	Unlikely to pass	Refused	TOTAL
The Legislature	7%	21%	71%	--	100%
Judicial Review	14%	21%	57%	7%	99%
Voter approval	21%	7%	71%	--	99%
TOTAL PERCENTAGE	14%	17%	67%	2%	100%

4. Another option is to ***expand*** the present medical malpractice rule that allows juries the opportunity to consider collateral sources of payment when developing award amounts to ***all*** personal injury actions.

Q4.	**Likely to pass**	**Too close to call**	**Unlikely to pass**	**Refused**	**TOTAL**
The Legislature	35%	7%	57%	--	99%
Judicial Review	43%	21%	36%	--	99%
Voter approval	29%	7%	64%	--	100%
TOTAL PERCENTAGE	36%	12%	52%	--	100%

5. The next reform would limit attorneys' to capped hourly wages when the parties settle within sixty days of filing.

Q5.	**Likely to pass**	**Too close to call**	**Unlikely to pass**	**Refused**	**TOTAL**
The Legislature	14%	--	86%	--	100%
Judicial Review	21%	7%	71%	--	99%
Voter approval	36%	14%	50%	--	100%
TOTAL PERCENTAGE	24%	7%	69%	--	100%

Additional Comments:

1. This option would be easy to work around and is impractical.

NOTES: Again, this is a reform option that would invite opposition from attorneys and is unlikely to survive the extreme attacks it would garner. However, if it were to become law, one respondent felt that it would be easy to work around. Essentially, attorneys could work around this type of law by waiting to settle for sixty-one days.

6. Now I would like to ask you about two reforms targeted at expert witnesses. The first reform would publish a history of testimony by expert witnesses and keep track of an expert's position in prior testimony, the number of times an expert has testified for a specific attorney or firm, and the percentage of total income an expert earns from such activities.

Q6.	Likely to pass	Too close to call	Unlikely to pass	Refused	TOTAL
The Legislature	57%	14%	29%	--	100%
Judicial Review	50%	14%	29%	7%	100%
Voter approval	64%	21%	14%	--	99%
TOTAL PERCENTAGE	57%	17%	24%	2%	100%

Additional Comments:

1. Are there privacy issues attached to this reform?

NOTES: This was the option that the legislators' interviewed felt had the best chance to become law in Arizona. However, one lawyer questioned whether there might be privacy issues attached to publishing a record of expert witness testimony. However, there should be no difficulty in publishing testimony that is public information.

7. The second expert witness reform seeks to shift the responsibility for compensating expert witnesses from the parties involved in a suit to the Courts.

Q7.	Likely to pass	Too close to call	Unlikely to pass	Refused	TOTAL
The Legislature	21%	--	79%	--	100%
Judicial Review	29%	14%	57%	--	100%
Voter approval	29%	14%	57%	--	100%
TOTAL PERCENTAGE	26%	10%	64%	--	100%

Additional Comments:

1. The courts are financially strapped.

NOTES: A majority of the respondents felt that this option could not currently become law. In general, this option is also not considered feasible because the courts do not have the funds to administer this type of program.

8. Another option is to place a cap on the monetary awards, or damages, that an injured party might recover.

Q8.	**Likely to pass**	**Too close to call**	**Unlikely to pass**	**Refused**	**TOTAL**
The Legislature	--	7%	93%	--	100%
Judicial Review	7%	--	93%	--	100%
Voter approval	7%	7%	86%	--	101%
TOTAL PERCENTAGE	5%	5%	91%	--	101%

Additional Comments:

1. Need an amendment.
2. Will not pass judicial review.

NOTES: This type of legislation is the most well known form of tort reform. However, in Arizona a cap on damage awards is not constitutionally supported. Thus, even if the legislature and voting public supported such a measure, it would not withstand judicial review.

9. Next, with one type of no-fault insurance reform, consumers can choose to give up their right to sue so that they collect their damages from their own insurance companies. If the injured party has damages that exceed their insurance, they could still sue for uncollected damages.

Q9.	**Likely to pass**	**Too close to call**	**Unlikely to pass**	**Refused**	**TOTAL**
The Legislature	14%	--	86%	--	100%
Judicial Review	29%	14%	57%	--	100%
Voter approval	14%	14%	71%	--	99%
TOTAL PERCENTAGE	19%	10%	71%	--	100%

10. Yet another option is to permit subrogration. This reform would allow insurers, hospitals, medical service corporations, and health care services organizations to include provisions in policies that would allow the organizations to recover payments by suing defendants or placing liens on damages awarded to plaintiffs.

Q10.	**Likely to pass**	**Too close to call**	**Unlikely to pass**	**Refused**	**TOTAL**
The Legislature	21%	14%	50%	14%	99%
Judicial Review	29%	43%	14%	14%	100%
Voter approval	14%	21%	50%	14%	99%
TOTAL PERCENTAGE	21%	26%	38%	14%	99%

Additional Comments:

1. Already a limited form of subrogation.

NOTES: As one respondent pointed out, one Arizona Statute (ARS 20-259.01 [I]) does allow for a limited form of subrogation. Insurance companies are currently allowed to sue at-fault uninsured motorists on the behalf of their clients.

11. Finally, one possible reform involves creating a statute of repose that prohibits a person from filing a suit twelve or more years after an injury is discovered.

Q11.	**Likely to pass**	**Too close to call**	**Unlikely to pass**	**Refused**	**TOTAL**
The Legislature	21%	36%	43%	--	100%
Judicial Review	36%	36%	29%	--	101%
Voter approval	21%	21%	57%	--	99%
TOTAL PERCENTAGE	26%	31%	43%	--	100%

12. Do you have any other comments regarding Tort Reform in Arizona?

1. In the short term, no reforms are likely to pass. At this point, there is no spokesperson.
2. Incremental or more limited reforms must be pursued.
3. Tort reform is unlikely to occur in Arizona.

NOTES: Again, tort reform in Arizona is a highly politicized issue. As a review of the history of tort reform in Arizona indicates, tort reform has been attempted several times. Currently, as one legislator added, there is no legislator willing to champion tort reform. However, if there was a political entity pursuing tort reform, another legislator felt that it should be pursued with smaller steps towards a larger goal. However, a third legislator commented that tort reform is unlikely to happen in Arizona. However, "unlikely to happen" does not equal "impossible" in the political world.

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