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## Writing Checks or Righting Wrongs: Election Funding and the Tort Decisions of the Ohio Supreme Court

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WRITING CHECKS OR RIGHTING WRONGS: ELECTION  
FUNDING AND THE TORT DECISIONS OF THE OHIO  
SUPREME COURT

JAMES T. O'REILLY<sup>1</sup>

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I. INTRODUCTION

It is a humbling experience to read the jurisprudence of the Ohio Supreme Court over a 200-year period, and to recognize that the small contributions our generation makes are but small decorations on top of an edifice that was built by giants. Our Supreme Court has had the benefit of some towering figures in the past, among an occasional scoundrel or two, but the court has made significant contributions to American tort law.<sup>2</sup> We who teach in the tort law field recognize Ohio's very substantial contribution to the evolving jurisprudence of tort law.<sup>3</sup> When the Ohio Supreme Court speaks on controversial issues in tort law, others listen.<sup>4</sup> But when

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<sup>2</sup>*See, e.g.*, *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958) (abolishing privity requirements); *Lonzrick v. Republic Steel Co.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966) (implied warranty in tort); *Temple v. Wean United Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977) (adopting strict liability).

<sup>3</sup>*Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St. 3d 507, 511, 700 N.E.2d 1247, 1251 (1998) (failure to include safety features); *Crislip v. TCH Liquidating Co.*, 52 Ohio St. 3d 251, 257, 556 N.E.2d 1177, 1182 (1990) (duty to warn of known danger).

<sup>4</sup>For example, the central concept of defective design is frequently illustrated by cases such as *Knitz v. Minster Machine Co.*, 69 Ohio St. 2d 460, 432 N.E.2d 814 (1982), *cert. denied*, 459 U.S. 857 (1982), *on remand*, No. C.A. L-84-125, 1987 WL 6486 (Ohio Ct. App.

our court today speaks so harshly and so inconsistently about tort policies, others may mourn the loss of our state's stare decisis principles in tort jurisprudence.

This paper will try to address the court's present and future course in tort law, with particular focus on products liability, malpractice, and employer tort liability. These are the most intriguing segments of modern tort law in Ohio. The paper concludes that stare decisis and the precedential accretion of the common law no longer seem to matter to the Ohio Supreme Court. Instead, the cacophony of a fractured court has imperiled predictability and imperiled the court's national reputation. Instead, the topic of a prospective justice's view of the tort system is unfortunately an early and frequent conversation in recruitment, selection, and funding of the candidates for the court. While tort law justice is not for sale in Ohio, its trends can be heavily influenced by the pervasive expense structure of supreme court electoral politics. Contrary to what television attack ads have claimed, justices' individual votes are not for sale, but their policy outcomes can perhaps be more closely predicted as a result of the forces that control campaign finance in Ohio judicial elections.

## II. POLITICAL CONTRIBUTIONS AND THE COURT'S TORT VIEWS

A careful analysis of Ohio Supreme Court elections demonstrates that elections are substantially affected by the consequences of the tort liability and malpractice cases on the court's docket. The term "products liability" does not appear anywhere in the Ohio Constitution, but it is talked about regularly among substantial donors and throughout the news media. The public is aware of damage lawsuits against product and service providers, and the tales of judicial largesse become legendary—like the \$2.7 million verdict, now an urban legend, for a scalding by McDonalds' coffee.<sup>5</sup> For better or worse, liability law themes sharpen the focus on what the prospective new member of the court can be expected to do as her or his contribution to society, in return for a segment of society's contributions to her or him as candidates.

The selection of "electable" candidates in the Ohio political party system will inevitably involve the attitudes and beliefs of the candidates about the issues of greatest interest to political donors, especially liability issues. The stance of Ohio Supreme Court candidates on product and medical liability is a theme that is talked about as exhibit A in the biennial political party meetings to select candidates for the court. In a similar vein, medical malpractice decisions of the court are exhibit B, and these discussions with candidates who become justices can carry enormous consequences for the representatives of insurers, litigation attorneys, hospitals, manufacturers, nurses, and physicians. These pre-election meetings occur within the party ranks but are rarely scrutinized from the outside. Candidates later appear before the microphones with a campaign war chest but no overt explanation for their selection. Even with the recent easing of judicial candidates' freedom to discuss

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Feb. 9, 1987). The recent gun maker liability opinion drew widespread notice, *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 768 N.E.2d 1136 (2002). See, e.g., <http://www.facworld.com/facworld.nsf/doc/gun1000litig>.

<sup>5</sup>Stella Liebeck was awarded \$2.7 million in punitive damages against the restaurant chain McDonalds. The eventual payout was believed to be much lower. *Actual Facts About the McDonalds Case*, Electric Law Library, at <http://www.lectlaw.com/files/cur78.html>.

issues,<sup>6</sup> tort law and funding is a connection that seems best left unstated. Beyond the view of the media, the handlers behind the candidates will unabashedly invoke liability law as a sparkplug to raise funds for judicial candidates for the court. The candidates' positions on medical liability are invoked when one wants to achieve a rise in contributions from an affected medical group or a trial attorney organization. This is the rarely discussed underside of judicial elections, but it is Ohio's reality.

The fiscal background of this process is remarkable: About two dollars were spent for every vote the winners received in the 2002 election. A new justice begins a six-year term with the knowledge that a \$758,000 reelection fund was needed for the fellow justice who retained her seat in 2002.<sup>7</sup> Raising an average of \$10,500 in contributions each month for six years will fund the actual cost of one recent reelection campaign.<sup>8</sup> One incumbent justice raised 85% of his funds from business groups, according to a watchdog website's analysis of donor identities.<sup>9</sup> About 1.6 million voters statewide voted for one or both of the winning candidates for the Ohio Supreme Court in 2002.<sup>10</sup> The four interest groups that worked hardest on the advertising for that campaign spent more than \$1.6 million,<sup>11</sup> while the two winning candidates spent another \$1.6 million that they raised themselves.<sup>12</sup> The result was a Republican victory for both seats that cost the winners and their allies about two dollars per voter. When the losing Democratic candidates' expenditures are counted, the total cost of airtime for broadcast ads for the two supreme court seats was \$4,833,786,<sup>13</sup> making 2002 one of the most expensive races in Ohio Supreme Court history. The 2002 Republican winners become two of seven justices on a court with a recent history of 4-3 voting patterns.

### III. A PERSONAL DISCLAIMER

Before this paper enters the academic analysis of tort jurisprudence, the author explains why the paper offers a little more skeptical perspective than other professors might present. Before entering full-time academic life, I was a member of the candidate selection subcommittee of the corporate political action committee of one

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<sup>6</sup>Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

<sup>7</sup>Stratton for Supreme Court, *Post-Campaign Report of Expenditures*, at [http://serform2.sos.state.oh.us/pls/porthope/DEV.RPT\\_CAND\\_COVERPAGE1.show?p\\_arg\\_names=year&p\\_arg\\_values=2002&p\\_arg\\_names=report\\_type&p\\_arg\\_values=400&p\\_arg\\_names=report\\_key&p\\_arg\\_values=44766](http://serform2.sos.state.oh.us/pls/porthope/DEV.RPT_CAND_COVERPAGE1.show?p_arg_names=year&p_arg_values=2002&p_arg_names=report_type&p_arg_values=400&p_arg_names=report_key&p_arg_values=44766).

<sup>8</sup>Of course, the actual fundraising is done within the final 12-15 months of the justice's term and is done via surrogates.

<sup>9</sup>Ohio Citizen, at <http://www.opensecrets.org/oh/gets/st/index/4.html> (Justice Pfeifer).

<sup>10</sup>Ohio Secretary of State, *Official Election Results*, at <http://www.state.oh.us/sos/2002General/2002GenResults.html>.

<sup>11</sup>Brennan Center for Justice, NYU, Press Release, *More State Supreme Court Races Include Advertising; More Advertising by Interest Groups* (Nov. 6, 2002).

<sup>12</sup>Ohio Secretary of State, *Candidate Filings for Maureen O'Connor and Evelyn Stratton*, at <http://www.state.oh.us/sos/2002General/02GenSupCrt2.html>.

<sup>13</sup>Brennan Center for Justice, NYU, *Buying Time 2002: Television Advertising in State Supreme Court Elections* (2002).

of Ohio's largest corporations. That PAC gave substantial funds to candidates, over \$200,000 last year.<sup>14</sup> So I have the experience of having met justices and would-be justices in their "lean and hungry" mode, and I have contributed hundreds of dollars of my own money to some of their campaigns. Did it buy me anything? No—nor would I expect it to. Does the PAC contribution swing votes? Probably not, but the \$10,500-per-month cost of reelection is a constant reminder that the justice who seeks to retain a place on the court will be soliciting funds from PACs and donors in the future.

I also have an odd perspective on the legislature's role in justice matters, for our former governor once asked me to run for the state legislature, to secure a vulnerable seat. I chose instead to stay in the classroom, but my visit to the State House included sitting in the ninety-ninth chair in the far back of the general assembly. I wondered how the pressures would feel as the occupant of that seat worried about reelection. For a junior member of the legislature, the local issues matter, political fundraising matters, party allegiance is important, and pressures of timing and workload for this part-time job can be pretty significant.

Some questions would present themselves to any new member of the legislature—who, with term limits, is probably a newcomer to the Columbus power structure. Would such a legislator feel subordinate to the elected justices' views on an issue of public controversy like limitations on tort damages? Probably not. In a state where the supreme court's former building was taken over and remodeled into offices for the state senate, and where funding for renovation of a new supreme court building is slowly progressing, will the court be a welcomed supplicant to the very legislature that it has so harshly scolded? Is there ample evidence<sup>15</sup> of an inter-branch rivalry in which tort issues are entangled? Certainly. Does the tension of checks and balances affect the quality of the jurisprudence on tort issues in Ohio? It certainly does. Is the tort issue a prism through which to view the court's next decade of challenges? I think it is. With those caveats, our analysis proceeds.

#### IV. THE APRIL 2003 TORT LEGISLATION

Let's consider how the Ohio Supreme Court's view of torts looks from the drafting table of the State House. A few days ago, on April 11, 2003, a new statute went into effect<sup>16</sup> which squarely faces the dilemma of constitutional views expressed by the Ohio Supreme Court concerning the due-process and the access-to-courts language of the Ohio Constitution.<sup>17</sup>

The Ohio Legislature has been engaged in a bizarre form of institutional dialogue with the Ohio Supreme Court, through the preamble clauses to legislation, responded to with the justices' return volleys in plurality and dissenting court opinions. It is not

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<sup>14</sup>Procter & Gamble Good Government Committee, at [http://herndon1.sdrdc.com/cgi-bin/fecgifpdf/?\\_9053+23990119204.pdf](http://herndon1.sdrdc.com/cgi-bin/fecgifpdf/?_9053+23990119204.pdf).

<sup>15</sup>*See, e.g., State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999), *reconsideration denied*, 87 Ohio St. 3d 1409, 716 N.E.2d 1170 (1999).

<sup>16</sup>Act of Dec. 10, 2002 (effective Apr. 11, 2003), S.B. 281, § 3, 2002 Ohio Legis. Serv. at L-3280 (Banks-Baldwin).

<sup>17</sup>OHIO CONST. art. I, § 16.

surprising that the court hired its own lobbyist from the Ohio House minority staff in August 2002.<sup>18</sup> In this most recent statute, the legislature is amending tort liability in several ways that run directly contrary to the prior 4-3 pronouncements of the supreme court. In the new tort law that went into effect on April 11, the preface includes the legislature's unusually deferential and even pleading message to the court, in the introductory section of the new statute, as follows:<sup>19</sup>

The Ohio General Assembly respectfully requests the Ohio Supreme Court to uphold this intent in the courts of Ohio, to reconsider its holding on damage caps in [*Sheward*],<sup>20</sup> to reconsider its holding on the deductibility of collateral source benefits in [*Sorrel*],<sup>21</sup> and to reconsider its holding on statutes of repose in [*Sedar*],<sup>22</sup> thereby providing health care practitioners with access to affordable medical malpractice insurance and maintaining the provision of quality health care in Ohio.

In the preamble to its new statute, the legislature quoted from Alaska and Delaware appellate opinions, federal agency studies, laws in other states, and miscellaneous other resource materials. And then, beseeching the court for mercy, the legislators offered a limited salute to the court's constitutional autonomy:

The General Assembly acknowledges the Court's authority in prescribing rules governing practice and procedure in the courts of this state as provided in Section 5 of Article IV of the Ohio Constitution.<sup>23</sup>

The anticipation of yet another harsh rebuke from the court, that the legislature cannot tell the court how to govern tort-related court procedures, probably led to this "acknowledgement." The very odd form of signaling that this message represents may seem alien to observers in other states where judges are selected on merit. The depth of antipathy can best be appreciated by study of the even worse dialogue in the Ohio school funding case, a hot potato passed back and forth from court to legislature over more than a dozen years.<sup>24</sup>

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<sup>18</sup>Ohio Supreme Court Communications Office, *Court Hires Legislative Counsel* (Aug. 22, 2002).

<sup>19</sup>Act of Dec. 10, 2002, S.B. 281, § 3(C)(1), 2002 Ohio Legis. Serv. at L-3282 (Banks-Baldwin).

<sup>20</sup>State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

<sup>21</sup>Sorrel v. Thevenir, 69 Ohio St. 3d 415, 633 N.E.2d 504 (1994).

<sup>22</sup>Sedar v. Knowlton Constr. Co., 49 Ohio St. 3d 193, 551 N.E.2d 938 (1990), *overruled* by Brennaman v. R.M.I. Co., 70 Ohio St. 3d 460, 639 N.E.2d 425 (1994).

<sup>23</sup>Act of Dec. 10, 2002, S.B. 281, § 3(C)(2), 2002 Ohio Legis. Serv. at L-3282 (Banks-Baldwin).

<sup>24</sup>DeRolph v. State, 79 Ohio St. 3d 297, 681 N.E.2d 424 (1997).

## V. THE OHIO CONSTITUTION'S ACCESS TO COURTS CLAUSE

The Ohio Constitution provides in Article I, Section 16 for access to the courts and for remedies by “due course of law,” our state’s constitutional equivalent of the federal due process concept:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.<sup>25</sup>

The roots of the first sentence of this section are traceable to the original 1802 Ohio Constitution.<sup>26</sup> The original provision expanded on part of the Northwest Ordinance, which stated that the citizens of the Northwest Territory “shall always be entitled to the benefits of . . . judicial proceedings according to the course of the common law.”<sup>27</sup> Even further back are its roots in chapter 40 of Magna Carta in 1215, which inspired Ohio’s right-to-a-remedy clause and similar clauses in thirty-nine state constitutions. Courts were corruptly selling writs to the rich and powerful, and access to impartial courts was a very serious issue. This aspect of Magna Carta had been incorporated into the colonies’ charters of rights at the time of the American Revolution.<sup>28</sup>

During that same period the federal Bill of Rights<sup>29</sup> was being adopted, which protects the right to petition government for redress of grievances. So the Ohio language is in part analogous to the Due Process Clause in the contemporaneous federal Fifth Amendment,<sup>30</sup> and the due process and equal protection guarantees in the much later Fourteenth Amendment.<sup>31</sup> In part it goes farther, since the U.S. Constitution does not have a comparable court access clause.

As the official commentary on the Ohio Constitution has observed, the open courts clause “has been construed to require public court proceedings, absent the necessity for closed proceedings to protect some overriding interest or insure the orderly administration of justice.”<sup>32</sup> Beyond simple access, the right-to-a-remedy clause has spawned a wide variety of cases involving claims of deprivation of a remedy for injuries to property, person, or reputation.<sup>33</sup> Likewise, Ohio’s due process

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<sup>25</sup>OHIO CONST. art. I, § 16.

<sup>26</sup>OHIO CONST. of 1802, art. VIII, § 7.

<sup>27</sup>NORTHWEST ORDINANCE, art. II, § 14 (1787).

<sup>28</sup>Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OREGON L. REV. 1279 (1995).

<sup>29</sup>U.S. CONST. amend. I-X.

<sup>30</sup>U.S. CONST. amend. V.

<sup>31</sup>U.S. CONST. amend. XIV.

<sup>32</sup>Banks-Baldwin commentary to OHIO CONST. art. I, § 16 (citing *State ex rel. The Repository v. Unger*, 28 Ohio St. 3d 418, 504 N.E.2d 37 (1986); *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (Cuyahoga Cty. 1955)).

<sup>33</sup>*See, e.g., Leiberg v. Vitangeli*, 70 Ohio App. 479, 47 N.E.2d 235 (Stark Cty. 1942) (giving aliens access to courts); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949) (allowing newborn child to sue for injuries suffered in mother’s womb).

guarantee has been invoked in a variety of cases, the basic thrust of the clause being a requirement for notice and an opportunity for a fair hearing.<sup>34</sup> Due process analysis under this section is frequently coupled with equal protection analysis under the Ohio Constitution.<sup>35</sup> And the Ohio Supreme Court sometimes uses the access-to-courts clause<sup>36</sup> together with the right-to-a-jury clause<sup>37</sup> when it looks to state constitutional bases for attack on such tort reform legislation.

When the Ohio Supreme Court's 4-3 majority blasted the Ohio General Assembly in the 1999 *Sheward* decision,<sup>38</sup> harshly reaming the legislature with strident tones, the court stated that in enacting its tort reform legislation, the general assembly refused to recognize cases that had held that the legislature was *constitutionally* precluded from depriving a claimant of a right to a remedy before the claimant knew or should have known of an injury.<sup>39</sup> The legislature attempted to overrule judicial declarations of unconstitutionality,<sup>40</sup> but this was said to violate the separation of powers since the legislative branch does not have the final say as to the meaning of the constitution—the judiciary does.<sup>41</sup>

#### VI. OHIO AND TORT LAW EVOLVE TOGETHER

For those constitutional scholars who are truly originalists, the early decisions of the courts offer little illumination about intent. The Ohio Supreme Court in volume two of Ohio Reports gave us the first reported appellate decision in torts. The steamboat collision litigation of *Case & Davis v. Mark*<sup>42</sup> in 1825 involved two Cincinnati famous names, argued by the lawyer for whom downtown Cincinnati's Piatt Park is named and decided by Justice Burnet for whom Burnet Woods in Cincinnati was named. The opinion dealt with what we today would call negligence and remedies; it differentiated the forms of action for trespass on the case and found that causation could be deemed to be direct where a steamboat captain had allowed his boat to collide with and sink the plaintiff's boat. The court focused upon damages, causation, and forms of action long before the legislature entered the tort remedy field.

The court has come a long way since then, and it is no longer the sole determiner of tort policy. Inevitable tension arises when an appellate court's common law powers to articulate new "law" of Ohio collide with the Ohio Legislature's power to

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<sup>34</sup>*See, e.g.*, *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hospital Ass'n*, 28 Ohio St. 3d 118, 502 N.E.2d 599 (1986).

<sup>35</sup>OHIO CONST. art. I, § 2. *See, e.g.*, *Coca-Cola Bottling Corp. v. Lindley*, 54 Ohio St. 2d 1, 374 N.E.2d 400 (1978).

<sup>36</sup>OHIO CONST. art. I, § 16.

<sup>37</sup>OHIO CONST. art. IV, § 5.

<sup>38</sup>*Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

<sup>39</sup>*Id.* at 476, 715 N.E.2d at 1085.

<sup>40</sup>*Id.* at 492, 715 N.E.2d at 1096.

<sup>41</sup>*Id.* at 493, 715 N.E.2d at 1097.

<sup>42</sup>2 Ohio St. 169 (1825).



define what rights the law should provide for injured persons. Political scientists of the future will find this a case study of fractious inter-branch rivalry.

This paper will now turn to several contemporary issues in tort law that have affected the Ohio Supreme Court and are likely to be prominently featured in its future evolution. Selecting these themes does not infer peaceful acceptance of the court majority's views in other fields, but simply reflects one view of the hot button tort issues.

## VII. PUNITIVE DAMAGES

The due process guarantee in the Ohio Constitution, unlike its federal counterpart, is immediately followed by a right of access to the state's courts.<sup>43</sup> So the linkage between a civil tort plaintiff's access to remedial relief and the Ohio doctrine of due process is very close. The ability to recoup compensatory damages is important for victims of bad products or bad physicians; the ability to deter such bad conduct by various means is important for society at large. Punitive damage awards are a controversial method of deterring and punishing malpractice and errant product-designer choices.<sup>44</sup> The legislature responded with a set of punitive damage constraints that were then struck down by the Ohio Supreme Court in the 1999 *Sheward*<sup>45</sup> decision.

By what ratio can a punitive damage award exceed actual damages, before it violates the due process rights of the defendant? The U.S. Supreme Court's landmark April 7, 2003 decision limiting punitive damage awards in the *State Farm* case<sup>46</sup> placed a presumptive limitation of "single digit multipliers" (i.e., no more than nine times actual damages) on future federal product liability awards of punitive damages. That decision makes for a useful contrast with the December 2002 Ohio *Dardinger* decision,<sup>47</sup> since both courts spoke of due process considerations in civil tort litigation concerning punitive damages.<sup>48</sup> Compared to the U.S. Supreme Court's 9:1 presumptive acceptability range in *State Farm*, the Ohio Supreme Court allowed a

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<sup>43</sup>OHIO CONST. art. I, § 16.

<sup>44</sup>Opponents of punitive damages, whose proposals range from damage caps or restrictive formulae to outright elimination, describe punitive damages as an unruly doctrinal foundling, capable of outrageous and wanton excess, and incapable of placement in any traditional tort structure. The distillate of such arguments is that "unmediated punitive damages have no ad valoram effect in accident law, serve no progressive contemporary tort objective, preserve the specter of ungoverned overdeterrence, and 'appear to be an anomaly, a hybrid in search of a rationale.'" M. Stuart Madden, *Renegade Conduct and Punitive Damages in Tort*, 53 S.C. L. REV. 1175 (2002).

<sup>45</sup>*Sheward*, 86 Ohio St. 3d at 483, 715 N.E.2d at 1090.

<sup>46</sup>*State Farm Mutual Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).

<sup>47</sup>*Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 781 N.E.2d 121 (2002).

<sup>48</sup>*State Farm*, 123 S. Ct. at 1519-20 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996) and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001)).

large multiplier (49:1) in *Dardinger* and a larger number (100:1) in *Williams*,<sup>49</sup> while accepting a 6,250:1 punitive/actual multiplier in *Wightman*.<sup>50</sup> When the legislature selected a 3:1 ratio, the Ohio Supreme Court rebuked it in *Sheward*.<sup>51</sup> The U.S. Supreme Court's view trumps that of the Ohio Supreme Court as to the due process constitutionality threshold on federal issues, and since it reversed the Utah Supreme Court when it decided *State Farm*, it arguably overrode state due process views of courts like the Ohio Supreme Court as well.

In *Dardinger*,<sup>52</sup> a 4-3 decision that probably drew hot debate within the court's chambers before its issuance, Justice Paul Pfeifer, formerly one of the most powerful members of the Ohio Senate before receiving the court nomination as a Republican in 1992, waxed eloquent in criticizing a health maintenance organization's internal bureaucracy that dawdled while a patient was denied experimental medical treatment. The lyrical rhetoric builds to a crescendo rarely seen in bland appellate prose:

Here, the tragedy evolved over months, while Anthem and AICI watched. They created hope, then snatched it away. They took a dignified death from Esther Dardinger and filled her last days with frustration, doubt, and desperation. And every minute of additional pain suffered by Esther Dardinger was a natural outgrowth of the defendants' practiced powerlessness, their active inactivity.<sup>53</sup>

Quoting from the classic movie *Casablanca* and other sources, the majority opinion noted that legislatures divide punitive damages in some states but that in Ohio it was solely the role of the four justices in the majority to allocate the funds:

There is a philosophical void between the reasons we award punitive damages and how the damages are distributed. The community makes the statement, while the plaintiff reaps the monetary award. Numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state. In some states, the state's portion goes to a special fund, in others, to the general fund. In Ohio, punitive damages are an outgrowth of the common law. Therefore, Ohio's courts have a central role to play in the distribution of punitive damages. Punitive damages awards should not be subject to

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<sup>49</sup>*Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 479-480, 700 N.E.2d 859, 870-871 (1998).

<sup>50</sup>*Wightman v. Consolidated Rail Corp.*, 86 Ohio St. 3d 431, 438, 715 N.E.2d 546, 552-53 (1999).

<sup>51</sup>“[T]he General Assembly has in effect found that any punitive damage award in excess of the greater of three times the amount of compensatory damages or \$250,000 is unconstitutional. This finding contravenes our decision in *Williams v. Aetna Fin. Co.*, [83 Ohio St. 3d 464, 479-80, 700 N.E.2d 859, 870-71 (1998),] where we upheld the constitutionality of an award for \$15,000 in compensatory damages and \$1.5 million in punitive damages.” *Sheward*, 86 Ohio St. 3d at 485, 715 N.E.2d at 1091.

<sup>52</sup>*Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 781 N.E.2d 121 (2002).

<sup>53</sup>*Id.* at 98, 781 N.E.2d at 140.

bright-line division but instead should be considered on a case-by-case basis, with those awards making the most significant societal statements being the most likely candidates for alternative distribution.<sup>54</sup>

The author of the majority opinion, Justice Paul Pfeifer, subsequently explained his position in a weekly website column, in which he again excoriated the defendant.<sup>55</sup> The supreme court's majority took a very controversial left turn from prior law and followed Pfeifer into uncharted territory. According to critics of the court's 4-3 majority, the justices commandeered the cash from the jury award<sup>56</sup> by creating a nonstatutory distribution of their own imaginative creation:

The final net amount remaining after the prescribed payments should go to a place that will achieve a societal good, a good that can rationally offset the harm done by the defendants in this case. Due to the societal stake in the punitive damages award, we find it most appropriate that it go to a state institution. In this case we order that the corpus of the punitive damages award go to a cancer research fund, to be called the Esther Dardinger Fund, at the James Cancer Hospital and Solove Research Institute at the Ohio State University.<sup>57</sup>

The concept of *cy pres* is recognized in equity, seeking to reach the testator's intent by giving funds to a donee whose purposes most nearly approximate those of the testamentary gift whose donee is unavailable.<sup>58</sup> But this was a \$20 million twist in a case involving not equity but common law remedial allocation of awards: Here a most reluctant donor is being forced to pay a huge sum to an unsuspecting charity which (presumably) had not campaigned for the gift. Ironically, the plaintiff had expected to make a much smaller gift in memory of his late wife, to another institution,<sup>59</sup> before the four justices bestowed tens of millions of dollars on their local hospital in Columbus.

Before your law school foundation director begins to salivate at the thought of a future court award that redirects money to Cleveland-Marshall Law School, let's

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<sup>54</sup>*Id.* at 104-05, 781 N.E.2d at 145-46.

<sup>55</sup> "[A] punitive damages award is about the defendant's actions—it is meant to punish the guilty and deter future misconduct, not enrich the plaintiff. In essence, the jury is determining whether and to what extent we as a society should punish the defendant. A punitive damages award, then, is a means of the community making a statement." Weekly Column of Justice Pfeifer, at [http://www.sconet.state.oh.us/Communications\\_Office/Justice\\_Pfeifer/2003/jp040903.asp](http://www.sconet.state.oh.us/Communications_Office/Justice_Pfeifer/2003/jp040903.asp). (Apr. 2, 2003).

<sup>56</sup>An economist's criticism of the method of reallocation is found in Ralph Frasca, *The Dardinger Case: An Unconstitutional Taking*, Buckeye Institute of Ohio, at [http://www.buckeyeinstitute.org/Articles/2003\\_01%20Frasca.html](http://www.buckeyeinstitute.org/Articles/2003_01%20Frasca.html).

<sup>57</sup>*Dardinger*, 98 Ohio St. 3d at 105, 781 N.E.2d at 146.

<sup>58</sup>*Stark v. Leonard Fuchs Irrevocable Gift Trust*, 145 Ohio App. 3d 699, 764 N.E.2d 446 (2001).

<sup>59</sup>*Dardinger: Court Ruling Sends a Message*, NEWARK ADVOCATE, Dec. 22, 2002.

remember that in 2002, Cleveland-Marshall's only alumnus on the court voted to send the defendant's cash to Ohio State!<sup>60</sup>

#### VIII. STATUTES OF REPOSE

The concept of legislation fixing a time after which the risk of liability claims would end is well understood in modern tort law. The political consequences of the statute of repose are particularly important in a "rust belt" state where many durable goods are produced. When the legislature selects a tax depreciation "useful life" figure for a type of tax-deductible equipment, it is making a fiscal judgment that is noticed only by tax accountants. But when it picks a deadline for lawsuits and allows the makers of older machines to escape tort liability, it is making a critical public policy choice that aids equipment makers and affects individual workers. These hardy machine tools, cranes, punch presses, and tractors from Ohio have long lives and probably do not become safer as they get older. A statute of repose that applies across the board makes the plaintiff's claim more difficult, and discourages plaintiffs' attorneys from taking cases, even with catastrophic injuries. Hence the real controversy that such laws present is between beneficiaries of competing demands for protection.

It is the legislature's prerogative to establish terms of liability under statutory law, but this power may collide with the "access to courts" protection mentioned earlier. The court has varied in its views with the justices' electorally shifting majority. The Ohio Legislature, in the new tort law effective April 11, 2003, has begged the Ohio Supreme Court to change its view on statutes of repose.<sup>61</sup>

The Court of Appeals in Franklin County attempted to recap the war between the legislature and the supreme court in these terms:

[U]nder appropriate circumstances the General Assembly may supersede the prospective application of a Supreme Court decision through its general power to make legislative changes. . . . [A] decision by the General Assembly to enact legislation to supersede a Supreme Court decision by name is no more an infringement on the power of the judiciary than a decision by the Supreme Court to declare a statute unconstitutional is an infringement on the power of the General Assembly to enact legislation. . . . While the judiciary retains the power to nullify legislation that violates constitutional provisions, the judiciary was obligated to respect the General Assembly's expression of its disagreement with the Supreme Court's *interpretation* of R.C. 3937.18 in *Savoie*.<sup>62</sup>

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<sup>60</sup>Justice Francis Sweeney, who voted with the majority in *Dardinger*, is a CSU alumnus. See <http://www.sconet.state.oh.us/Justices/Sweeney>.

<sup>61</sup>Act of Dec. 10, 2002 (effective Apr. 11, 2003), S.B. 281, § 3(C)(1), 2002 Ohio Legis. Serv. at L-3282 (Banks-Baldwin) (asking the court "to reconsider its holding on statutes of repose in *Sedar v. Knowlton Const. Co.*, [49 Ohio St. 3d 193, 551 N.E.2d 938 (1990)], thereby providing health care practitioners with access to affordable medical malpractice insurance and maintaining the provision of quality health care in Ohio").

<sup>62</sup>*Webb ex rel. Webb v. Progressive Ins. Co.*, No. 01AP-534, 2001 WL 1340751, at \*5-6 (Ohio Ct. App. Nov. 1, 2001) (Franklin Cty.) (emphasis in original), *appeal not allowed*, 94 Ohio St. 3d 1454, 762 N.E.2d 371 (2002).

Those are the words of the lower court, not the Ohio Supreme Court. Recent decisional outcomes explain why the legislature would beseech the court not to overturn its next attempt to impose such a repose. A statute of repose protecting architects' and builders' services<sup>63</sup> was held in 1990 not to violate the due process or right-to-a-remedy provisions<sup>64</sup> or the equal protection guarantees<sup>65</sup> of the Ohio Constitution.<sup>66</sup> The court held in the 1994 *Brennaman* decision that the constitution's "right to a judicial remedy" clause requires that plaintiffs have a reasonable period of time to enter the courthouse to seek compensation after an accident.<sup>67</sup> The court held in 1999 that such a legislated "statute of repose" for products liability claims violated Ohio's Constitution.<sup>68</sup> In 1987, statutes of repose barring the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries were held to violate the access-to-courts provision remedy.<sup>69</sup> In the 1999 *Sheward* case, the Ohio Supreme Court held that the six-year statute of repose governing medical malpractice claims violated that same provision of the constitution guaranteeing a right to a remedy.<sup>70</sup>

The statute of repose becomes especially problematic when it cuts off a right of access to the courts for belatedly discovered toxic effects of chemical exposures. The Ohio Supreme Court held in 1993 in *Burgess*<sup>71</sup> that a cause of action for injuries resulting from diethylstilbestrol (DES) properly accrues when the claimant either is informed by competent medical authority that she has been injured by DES, or when she should have known that she has been so injured by the exercise of reasonable diligence.<sup>72</sup> The legislature's attempt to cut off DES suits<sup>73</sup> by triggering the two-year period of limitations from the time she learns she may possibly have a DES-related injury was invalidated as an unconstitutional infringement on the right of access to the courts, because it would have compelled the tort claimant to file a premature lawsuit which could not survive a motion for summary judgment.<sup>74</sup>

What will the court's new conservative majority do in 2004 in response to the April 11 legislation's extraordinary request for permission to enact a statute of

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<sup>63</sup>OHIO REV. CODE § 2305.131.

<sup>64</sup>OHIO CONST. art. I, § 16.

<sup>65</sup>OHIO CONST. art. I, § 2.

<sup>66</sup>*Sedar v. Knowlton Constr. Co.*, 49 Ohio St. 3d 193, 551 N.E.2d 938 (1990).

<sup>67</sup>*Brennaman v. R.M.I. Co.*, 70 Ohio St. 3d 460, 639 N.E.2d 425 (1994), *amended*, 71 Ohio St. 3d 1211, 643 N.E.2d 138 (1994).

<sup>68</sup>*Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

<sup>69</sup>*Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987), *cert. denied*, 484 U.S. 1066 (1987).

<sup>70</sup>*Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

<sup>71</sup>*Burgess v. Eli Lilly & Co.*, 66 Ohio St. 3d 59, 609 N.E.2d 140 (1993), *answer to certified question conformed to* 995 F.2d 646 (6th Cir. 1993).

<sup>72</sup>66 Ohio St. 3d at 64, 609 N.E.2d at 143-44.

<sup>73</sup>OHIO REV. CODE § 2305.10.

<sup>74</sup>*Burgess*, 66 Ohio St. 3d at 62-63, 609 N.E.2d at 142-43.

repose? Will *Sheward's* hostile language toward the legislature survive the shift of power inside the court? Will the addition of a very conservative Republican to the court majority, while a very conservative Republican majority holds both legislative houses and all elected state offices, shift the views of the court to a kinder, gentler tone?

#### IX. COLLATERAL BENEFITS

The tort law's compensation to a victim sometimes includes jury awards for amounts that had already been paid by others—e.g., an award for hospital bills already paid by one's medical insurance. The consideration of these "collateral" amounts would diminish the amount of a jury award. The Ohio Supreme Court in *Sheward* rejected the legislature's effort to impose a reduction on verdicts for collateral sources of remedial income. The statute that the court invalidated:

essentially gathers all evidence of collateral source payments, regardless of the category of harm for which it compensates and regardless of whether it compensates for past or future losses, tosses it in an indiscriminate heap along with all categories and items of compensatory damages, and authorizes, out of that, a general verdict replete with collateral benefit setoffs. Any prevention of double recovery that may result from this morass is fortuitous at best. Indeed, the relation between the purported goal of eliminating double recovery and the means employed in amended R.C. 2317.45 to achieve it is so attenuated that one could conclude that the primary goal of R.C. 2317.45 is simply to reduce damages generally. Amended R.C. 2317.45 simply attempts to sidestep *Sorrell*.<sup>75</sup>

The Court had decided (in the 1994 *Sorrell* decision being "sidestepped") that a statute requiring a trial court to deduct from the total jury award any collateral benefits received by plaintiff could deny plaintiff any meaningful remedy by eliminating the entire jury award. This statute would hinder the fundamental right of victims to obtain recovery for all injuries or damages sustained. Thus the statute was held to violate the court access and jury trial clauses of the Ohio Constitution.<sup>76</sup>

#### X. CAPS ON DAMAGES

Ohio's constitutional right to a jury trial<sup>77</sup> has been held to include a right to a jury determination of the amount of damages.<sup>78</sup> Ohio "tort reform" legislation

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<sup>75</sup>*Sheward*, 86 Ohio St. 3d at 482, 715 N.E.2d at 1090.

<sup>76</sup>*Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 633 N.E.2d 504 (1994).

<sup>77</sup>OHIO CONST. art. I, § 5.

<sup>78</sup> "[T]he right to a jury trial includes the right to have the jury pass on all the factual issues in dispute. *Miller v. Wikel Mfg. Co.*, [46 Ohio St. 3d 76, 545 N.E.2d 76 (1989)]. The factual issues in dispute include the liability, the dollar amount of the liability, and the finality of that amount." *Richardson v. Board of County Com'rs of Tuscarawas County*, No. 95-AP-110114, 1996 WL 753188, at \*7 (Ohio Ct. App. Dec. 4, 1996). *Accord Gladon v. Greater Cleveland Regional Transit Auth.*, No. 64029, 1994 WL 78468 (Ohio Ct. App. Mar. 10, 1994) (*Cuyahoga Cty.*), *reversed on other grounds*, 75 Ohio St. 3d 312, 662 N.E.2d 287 (1996)

imposed a cap on the award of damages.<sup>79</sup> The court held in *Sheward* that: “The right belongs to the litigant, not the jury, and a statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance.”<sup>80</sup>

Medical malpractice verdicts could be capped by the legislature at a certain fixed dollar amount,<sup>81</sup> and by doing so the malpractice exposure of medical liability insurance carriers could be reduced.<sup>82</sup> But the consequence of the cap is that the injured patient is less likely to obtain an aggressive contingent fee plaintiff’s attorney to pursue the damages request.

The caps on damages rejected by the Ohio Supreme Court in *Sheward* will be back before the court in a different form under the April 11 legislation. Stare decisis may be replaced by a “stare down” confrontation inside the court’s conference room. Much as one might love to listen in on that debate among the justices in private conference after the new case is argued to the full court, we on the outside can only speculate about what they will decide. If electoral trends trump stare decisis, one can predict that the new damage caps will be upheld 4-3 or 5-2 by the court, reversing *Sheward* and using the fluid reconstruction of the “access to courts” language as we described earlier. The U.S. Senate Democratic Caucus will play a large role in the Ohio Supreme Court’s voting pattern, as it holds up the fate of current Justice Deborah Cook while the Senate delays the confirmation of several candidates including Justice Cook to the federal Sixth Circuit. The replacement appointment will undoubtedly be asked whether he or she can reflect the current governor’s views of the tort system.<sup>83</sup>

#### XI. INTENTIONAL TORTS

The issue of most direct interest to unions is the ability of the injured worker to go beyond the small payments available under workers compensation. That system is constitutionally based and excludes virtually all civil suits against employers. The Ohio Supreme Court’s recognition of “intentional torts” ends exclusivity and is a direct economic threat to employers, who of course planned their budgets based on

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(featuring a searing attack on the majority by dissenting Justice Andrew Douglas, for the majority’s refusal to rule on constitutionality of damages caps).

<sup>79</sup>OHIO REV. CODE § 2315.21.

<sup>80</sup>*Sheward*, 86 Ohio St. 3d at 484-85, 715 N.E.2d at 1091.

<sup>81</sup>OHIO REV. CODE § 2323.43.

<sup>82</sup>Act of Dec. 10, 2002, S.B. 281, § 3(A)(3)(b), 2002 Ohio Legis. Serv. at L-3281 (Banks-Baldwin) (uncodified findings) (“Many medical malpractice insurers left the Ohio market as they faced increasing losses, largely as a consequence of rapidly rising compensatory damages and noneconomic loss awards in medical malpractice actions. The Department of Insurance reports that only six admitted carriers continue to actively write coverage in Ohio at this time.”).

<sup>83</sup>Governor Robert Taft’s former law firm (Taft Stettinius & Hollister) is one of the premier defense firms in appellate medical liability cases. *See, e.g.*, *York v. Mayfield Neurological Institute*, 133 Ohio App. 3d 777, 729 N.E.2d 1214 (2000).

the state constitution's provision<sup>84</sup> that workers compensation payments are the exclusive remedy.

Ohio Supreme Court case law on this end run around the exclusivity doctrine has featured a series of attacks and counter-attacks since 1982's *Blankenship* decision,<sup>85</sup> with the legislature and the court colliding on numerous occasions.<sup>86</sup> In 1999, the third Ohio legislative attempt to restrict intentional torts<sup>87</sup> was once again held unconstitutional by a 4-3 vote.<sup>88</sup> The legislative effort to override that decision continues.

## XII. THE COURT'S NEXT DECADE

Fear of tort law outcomes induces the cash investments by companies and individuals that in turn fuels Ohio Supreme Court election campaigns. Elections are about winning; parties exist to win elections; parties need candidates, issues, and money in the proper proportions. Tort reform and injured victims' rights are two sides of the same complex political issue. Even the law review commentators use controversial metaphors of battles of good and evil in describing these conflicts within appellate courts.<sup>89</sup>

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<sup>84</sup>OHIO CONST. art. II, § 35.

<sup>85</sup>*Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

<sup>86</sup>The 1995 legislature, in its uncodified statement of legislative intent for OHIO REV. CODE § 2745.01, squarely addressed the court's prior line of cases, in language that later drew harsh responses in *Sheward*: "The General Assembly hereby declares its intent in enacting sections 2305.112 and 2745.01 of the Revised Code to supersede the effect of the Ohio Supreme Court decisions in [*Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982); *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1406 (1984); *Van Fossen v. Babcock & Wilcox*, 36 Ohio St. 3d 100, 522 N.E.2d 489 (1988); *Pariseau v. Wedge Products, Inc.*, 36 Ohio St. 3d 124, 522 N.E.2d 511 (1988); *Hunter v. Shenago Furnace Co.*, 38 Ohio St. 3d 235, 527 N.E.2d 871 (1988); *Fyffe v. Jenos, Inc.*, 59 Ohio St. 3d 115, 570 N.E.2d 1108 (1991)], to the extent that the provisions of sections 2305.112 and 2745.01 of the Revised Code are to completely and solely control all causes of actions not governed by Section 35 of Article II, Ohio Constitution, for physical or psychological conditions, or death, brought by employees or the survivors of deceased employees against employers." Act of June 27, 1995, H.B. 103, § 3, 1995 Ohio Legis. Serv. at L-1403 (Banks-Baldwin).

<sup>87</sup>OHIO REV. CODE § 2745.01.

<sup>88</sup>*Johnson v. BP Chemicals Inc.*, 85 Ohio St. 3d 298, 707 N.E.2d 1107 (1999).

<sup>89</sup>"'Victim's talk' in the tort arena is used not only to disavow responsibility for defective products, bad medicine, and unsafe practices, but to sway the public against trial lawyers in general. Neo-conservatives often employ the theme of a 'culture of victimization gone wild' to ridicule plaintiffs seeking compensation for mass torts. The tort reformers, for example, attacked the plaintiff in a landmark tobacco product liability action by arguing that she should have taken personal responsibility for the cancer caused by her smoking rather than blame the tobacco industry." Michael Rustad & Thomas Koenig, *Taming the Tort Monster*, 68 BROOK. L. REV. 1, 4 (2002).

Neo-conservative tort reformers use the claim that runaway juries victimize corporations as a public relations device. The imagery of corporate victimhood advances their goal of



From the day they first met with their campaign treasurer and the party leadership, the justices of the Ohio Supreme Court have been aware of the extraordinary importance that tort and insurance issues have upon their careers on the court. The two Republicans elected in 2002 and the new Republican appointee to fill the seat of soon-to-be federal circuit court of appeals judge Cook are very aware of the expectations that their donors and supporters have for their votes. Of course, each would be expected to deny any financial impact on their decisional processes.

One can predict that the Ohio Supreme Court's 2003 conservative majority will sustain the legislature's effort at tort reform, chill the hostile rhetorical confrontations, and make peace. The reduction in scope of damages and value of claims will adversely affect the plaintiffs' bar in Ohio. The political struggle will continue, but the party that controls the Ohio Legislature is now firmly in control of the Ohio Supreme Court.

### XIII. A DISTANT FUTURE WITHOUT TORTS?

The distant future probably includes abandonment of the costly and wasteful current tort system. I have in an earlier article forecast that administrative adjudication of injury claims will replace the clogged courts that now inefficiently process claims in the tort system.<sup>90</sup> I predict that within fifty more years, the jury tort adjudication model will be replaced by a form of compensation awards system akin to the New Zealand approach. The tort system's enormous operating overhead costs detract from the compensatory ideal and from the redistributive model. Will it take a constitutional amendment to allow the state to replace jury trials with an administrative award system in tort cases? Probably. Is it impossible? No. Will Ohio tort victims be better served by the justice system when such a change occurs sometime in the future? Time will tell.

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limiting corporate liabilities and cultivating popular opinion against injured claimants and their attorneys.

<sup>90</sup>James T. O'Reilly, *ALJs in 2050: Consequences of Merging Tort and Administrative Remedies*, 20 J. NAT'L ASS'N ADMIN. LAW JUDGES 137 (2000).