1996

Ohio Tort Reform Versus the Ohio Constitution

Stephen J. Werber
Cleveland State University, s.werber@csuohio.edu

Original Citation

Stephen J. Werber, Ohio Tort Reform Versus the Ohio Constitution, 69 Temple Law Review 1155 (Fall 1996)

OHIO TORT REFORM VERSUS THE OHIO CONSTITUTION

*Stephen J. Werber**

I. INTRODUCTION

For more than a decade Ohio has been engaged in an ongoing legislative review of tort law. Significant components of the statutes derived from this review have been thwarted by decisions of the Ohio Supreme Court exercis-

* Professor, Cleveland State University, Cleveland-Marshall College of Law. B.A., Adelphi University; J.D., Cornell University; LL.M., New York University. Product liability defense litigation consultant to Weston, Hurd, Fallon, Paisley & Howley, Cleveland, Ohio (1984-August, 1996). This Article was made possible through the generous support of the Cleveland-Marshall Fund of the College of Law.

ing its right of judicial review.[1] Tort reform efforts have been nullified by broad application of the state constitutional rights of due process, equal protection, the right-to-remedy or open courts ("open courts") principle, and the right to trial by jury.[2]

Although civil and mannerly in its tone, with all heeding the principle of separation of power, there is no doubt that the Ohio Constitution forms the battleground for an ongoing war between the tort policies and power of the judicial branch and those of the legislative and executive branches of state government. The most recent battle is likely to occur over the validity of Ohio's newest tort reform bill which passed in the Joint Conference Committee ("JCC") this fall and will probably become law by early 1997.[3]

It is likely that constitutional challenges to key provisions of this new law will be brought as quickly as the Bar can find cases that present the opportunity. The court will then find itself in a battle created by the demands of judicial review in which it will, no doubt, rule that significant elements of the new legislation violate the Ohio Constitution while it will turn a blind eye to similar violations where the net effect is to increase the ability of injured parties to gain full compensation. An important issue in Ohio constitutional

---

1. This right was initially recognized by Chief Justice John Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and has its Ohio analogue in decisions such as State *ex rel* Bishop v. Board of Educ., 40 N.E.2d 913 (Ohio 1942), where the court recognized that its function was not to question the wisdom of legislation, but that when a statute is challenged on constitutional grounds its "sole function . . . is to determine whether it transcends the limits of legislative power." *Id.* at 919. *See also* State *ex rel* Whiteman v. Chase, 5 Ohio St. 528 (1856).

2. With the exception of the open courts provision found in Article I, § 16 of the Ohio Constitution, there are federal analogues to each of these Ohio provisions. Despite language which approaches a judicial form of the open courts standard found in *Marbury* and Wilson v. Iseminger, 185 U.S. 55 (1902), this right is not found in federal constitutional jurisprudence. *See* Stephen J. Werber, *The Constitutional Dimension of a National Products Liability Statute of Repose*, 40 VILL. L. REV. 985, 1005-12 (1995). This Article is limited to the interpretation and application of the Ohio Constitution.

3. House Bill 350 addresses over 90 sections of the Ohio Revised Code. This Article addresses selected sections which will have a significant impact upon torts generally, wrongful death actions, medical malpractice actions, and product liability claims. No effort is made to address all sections. Omitted from discussion are provisions such as those bearing upon sales of securities (Ch. 1797); political subdivisions (Ch. 2744); poison prevention and treatment centers (Ch. 3701); and sections affecting evidentiary concerns (§§ 2307.73(B), (D)); health care entities, such as hospital peer review committees (§ 2325.05); athletic coaches and officials (§ 2305.381); contingency fees for expert witnesses (§ 2317.46); and frivolous conduct issues (§ 2323.51). Time and space limitations also foreclose full treatment of proposed amendments to Ohio Rev. Code §§ 2307.31, 2307.32, and 2315.20, despite their bearing upon product liability litigation and their obvious relevance to other sections that are addressed. Due to its scope, House Bill 350 may be subjected to an attack based on Article II, § 15(C) of the Ohio Constitution—the one-subject rule. Such an attack was utilized to strike intentional tort reform legislation. See *infra* note 16 for a discussion of a similar constitutional challenge in Brady v. Safety-Kleen Corp., 576 N.E.2d 722 (Ohio 1991).

[Amended Substitute House Bill 350, in a form substantially similar to that discussed in this Article, was passed by the Ohio Senate on September 12, 1996, and by the Ohio House on September 26, 1996. The Bill was signed by Ohio Governor George Voinovich on October 28, 1996, and will take effect within 90 days.].

law is represented by this conflict; it is an issue that has emerged over the past several years and will continue to grow for at least several more years. In essence, the court has declared that tort reform which imposes significant limits on the right to bring a tort claim, the substantive nature of that claim, or the extent of allowable compensation will not be tolerated. That the other branches of government have insisted that such legislation is essential will have little bearing on the court's rulings. Contrary to the rather subservient role usually taken by the federal courts in their constitutional review of legislation,[4] the Ohio Supreme Court takes an activist role in its review of tort reform legislation.

The result of tort reform efforts in Ohio reveal, in its most naked form, a power struggle between common law tort principles which have expanded liability and legislative efforts to negate aspects of that expansion and to limit the financial exposure of culpable parties. Both the court and the legislature have erred to the detriment of all those affected as well as the civil justice system. The court has stricken legislation which restored balance and fostered reasonable economic objectives while the legislature has enacted provisions which ignore the rights of its citizens.

That key aspects of this latest effort at tort reform are likely to face judicial condemnation based upon constitutional infirmity is evident from recent history. Judicial precedent mandates that attacks will be made on at least the following provisions of the new law:

1. The Release and Repose amendments of the Wrongful Death Act;[5]
2. The standard for imposition of liability in toxic tort and hazardous substance litigation;[6]
3. The abrogation of the collateral source rule;[7]
4. The incomplete abolition of joint and several liability;[8]
5. Various statutes of repose;[9] and
6. The ceilings on noneconomic and punitive damages awards.[10]

---

4. *See, e.g.*, Heller v. Doe, 509 U.S. 312 (1993); FCC v. Beach Communications, Inc., 508 U.S. 307 (1993); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), *pet. for cert. filed*, 65 U.S.L.W. 3033 (U.S. July 1, 1996) (No. 96-1); Equality Found. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995); *cf.* USDA v. Moreno, 413 U.S. 528 (1973). The plurality opinion in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), indicates that at least some members of the Court are willing to perform a true rational basis evaluation rather than utilizing an overly deferential approach to congressional wisdom. Rational basis analysis was also used recently to overturn an amendment to the Colorado Constitution. Romer v. Evans, 116 S. Ct. 1620, 1629 (1996). The *Romer* opinion, however, is predicated on facts so aberrational as to defy future precedential effect.

5. Sub. H.B. 350 §§ 2125.01(B), 2125.02(D)(2)(a). The following analyses refer to either the new provisions or amendments to existing statutes.

6. *Id.* § 2307.792.

7. *Id.* § 2317.45.

8. *Id.* § 2307.31.

9. *See, e.g.*, *id.* § 2305.10(C) (product liability); *id.* § 2305.11(A) (medical claims); *id.* § 2305.13(A) (improvements to real property).

10. *Id.* §§ 2307.801, 2315.21, 2323.54.

If these challenges succeed, regardless of the strong arguments in support of each provision, the new tort reform act will be disabled though not destroyed. Remaining provisions will play an important role in leveling the playing field of tort law. These provisions include, but are not limited to: (1) abolishing the consumer expectancy definition of defect; (2) extending comparative fault principles to product liability actions; (3) creating a substance abuse defense; and (4) codifying the limitations on successor and enterprise corporate liability.[11] An argument can be made that these reforms, when combined with prior statutory provisions,[12] are sufficient and will permit all tort defendants, especially those who design and manufacture products, to adequately defend against charges of wrongdoing or product defect while permitting recovery in appropriate cases.

On one level it can be asserted that damage caps, repose statutes, and partial abrogation of joint and several liability are not necessary and that the other areas open to constitutional attack have such limited benefit as to be outweighed by their potential for harm. These provisions arguably reflect political and policy decisions far more than need. The conflict between the court and the legislative branch is arguably more policy based. Since the court cannot win on policy, or overrule legislation based on a determination as to its "wisdom,"[13] it must seek an alternate route. That route is the Ohio Constitution.

The better position largely supports the legislative effort. The proposed changes will allow adequate compensation while eliminating many of the current legal inducements for the filing of specious actions in the hopes of gaining either a settlement due to the expense of a defense or hitting the lottery on a flier. Only significant reform can restore and protect the rights of all parties in tort actions, particularly with regard to product liability corporate defendants. Provided that the changes do not arbitrarily impede legitimate claims, they should be enacted and upheld. Thus, although several additional reforms are likely to be attacked, the only proposals that are truly oppressive and worthy of constitutional attack are those relating to the statutes of repose and, perhaps, the ceilings on noneconomic loss and punitive damages.

---

11. *Id.* § 2307.75 (defect definition); *id.* §§ 2315.19, 2315.20 (comparative fault); *id.* § 2323.59 (substance abuse defense); *id.* § 2307.73 (corporate liability). These and other sections which should not be subject to serious constitutional attack are summarized *infra* Part III.A.

One or more of these provisions may, nevertheless, be subject to constitutional attack. Certainly, the abolition of the consumer expectancy test will be greeted with great hostility by many lawyers and judges. This redefinition of defect is consistent with the Restatement (Third) of Torts: Products Liability, §§ 2(b), 2(c), and cmt. a. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tent. Draft No. 2, 1995). The Reporter's Note to comment (a) provides a large body of literature that sets forth the reasons in support of such an approach, as to both design defects and failure to warn claims.

12. *See, e.g.,* OHIO REV. CODE ANN. §§ 2307.71-2307.80 (Anderson 1995) (product liability); *id.* §§ 2315.19, 2315.20 (comparative negligence, joint and several liability limitations); *id.* § 2745.01 (intentional tort).

13. State *ex rel* Bishop v. Board of Educ., 40 N.E.2d 913, 919 (Ohio 1942).

From the perspective of recent history, it is apparent that the court is fostering its tort policy beliefs through constitutional analysis. This is evident in decisions which considered diverse subject areas ranging from recovery amount limitations in medical malpractice actions to the right of employees to sue their employers without regard to workers' compensation exclusivity. Of considerable importance is the fact that the court utilized multiple constitutional provisions to attack and nullify each of the relevant legislative enactments. This flexibility of analysis does not bode well for those who support the totality of the pending legislative effort.

II. THE PRIMARY RECENT PRECEDENTS

Since 1991, the Ohio Supreme Court has found that at least five significant aspects of tort reform legislation violated one or more provisions of the state constitution.[14] These opinions addressed statutes bearing upon (1) the intentional tort exception to workers' compensation exclusivity, (2) a limitation on the damages available to injured parties in medical malpractice actions, (3) the abrogation of the collateral source rule, (4) the limitations on the right to recover punitive damages in tort actions as distinct from product liability actions, and (5) a statute of repose.

The first two decisions, *Morris v. Savoy*[15] and *Brady v. Safety-Kleen Corp.*,[16] were decided on the same day. *Brady* reviewed Ohio Revised Code section 4121.80 which was the legislative response to the court's decisions adopting the doctrine of intentional tort as a means to provide employees with a right to sue their employers in a tort action whenever an injury sus-

14. A sixth opinion, Burgess v. Eli Lilly & Co., 609 N.E.2d 140 (Ohio 1993), determined that Ohio Rev. Code § 2305.10, as it related to the accrual date of claims based on exposure to DES (diethylstilbestrol), violated both the due process and open courts clauses of the Ohio Constitution. As the opinion is largely consistent with legislative intent, it does not reflect a true conflict between the branches. An amendment to Ohio Rev. Code § 2305.10 relating to the accrual of a cause of action for injury caused by exposure to DES or other nonsteroidal synthetic estrogens is intended to reflect the holding of *Burgess*. *See* Amend. Sub. H.B. 350 § 5(D). *See also* Adamsky v. Buckeye Local Sch. Dist., 653 N.E.2d 212 (Ohio 1995) (statute of limitations for claims against political subdivisions violates equal protection when applied to minors); Hardy v. VerMeulen, 512 N.E.2d 626 (Ohio 1987) (medical malpractice statute of limitations violates open courts provision for lack of discovery rule), *cert. denied*, 484 U.S. 1066 (1988); Mominee v. Scherbarth, 503 N.E.2d 717 (Ohio 1986) (medical malpractice statute of limitations violates due process when applied to minors). The medical malpractice statute of limitations as applied to adults who, after discovery, lacked time to file a claim within the statutory period was invalidated after a review of equal protection, due process, and the open courts provision in Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709 (Ohio 1987).

15. 576 N.E.2d 765 (Ohio 1991).

16. 576 N.E.2d 722 (Ohio 1991). A subsequent effort to modify the decisional law, contained in Amended Substitute House Bill No. 107, was signed into law on July 20, 1993. This statute was deemed unconstitutional as enacted in violation of Article II, § 15(C) of the Ohio Constitution—the one-subject rule. *See* State *ex rel* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582 (Ohio 1994).

tained on the job could be viewed as "substantially certain" to occur.[17] *Morris* reviewed Ohio Revised Code section 2307.43 which imposed a monetary cap on the recovery allowed to compensate victims of medical malpractice and Ohio Revised Code section 2305.07 which abrogated the collateral source rule.

Section 4121.80 allowed an employee to bring an intentional tort action against an employer and, to this extent, was consistent with the decisional law recognizing this form of exception to workers' compensation immunity. The statute's comprehensive program included provisions which properly though narrowly defined "intentional tort" and "substantially certain" to make it clear that the employer's action had to be deliberate. However, it also mandated that the court determine only whether an intentional tort was committed. If so, the action would be referred to the Ohio Industrial Commission for a determination of damages subject to imposed limitations. Other provisions were similarly onerous. That the *Brady* court found this statute unconstitutional was surprising only in that it took so long to happen.[18]

The writer of the opinion and several concurring justices believed that the statute violated both equal protection and the right to trial by jury, while the concurring justices also asserted a violation of the open courts provision.[19] The holding of the court was predicated on (1) a violation of Article II, Section 34 of the Ohio Constitution as the statute did not further the "comfort, health, safety, and general welfare of all employees;"[20] and (2) an

17. This exception to the exclusive workers' compensation remedy set forth in Article II, § 35 of the Ohio Constitution, was announced in Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572 (Ohio), *cert. denied*, 459 U.S. 857 (1982), and subsequently explained with incorporation of the substantial certainty test in Jones v. VIP Dev. Co., 472 N.E.2d 1046 (Ohio 1984). The result was a plethora of employee tort actions against employers. *See, e.g.*, Pratt v. National Distillers & Chem. Corp., 853 F.2d 1329 (6th Cir. 1988) (reversing judgment notwithstanding verdict for death arising from workplace explosion), *cert. denied*, 489 U.S. 1012 (1989); Fyffe v. Jeno's Inc., 570 N.E.2d 1108 (Ohio 1991) (reversing grant of summary judgment where employee was injured while cleaning running conveyor belt after employer had removed safety device); Felden v. Ashland Chem. Co., 631 N.E.2d 689 (Ohio Ct. App. 1993) (viable action existed where employer refused to remove driveway obstacle resulting in injury to forklift operator).

18. Several earlier cases predicated on this statute had reached the court, but in none of those cases did the court suggest that it was unconstitutional other than in regard to possible retroactive application. *See, e.g.*, Van Fossen v. Babcock & Wilcox Co., 522 N.E.2d 489, 498 (Ohio 1988) (holding that no retroactivity barred plaintiff's claim when new statutory restriction was more limited than court-enunciated limit at time of injury); Kunkler v. Goodyear Tire & Rubber Co., 522 N.E.2d 477, 480 (Ohio 1988) (applying law as extant prior to enactment of pertinent statute).

19. *Brady*, 576 N.E.2d at 728 n.7, and the concurring opinions of Justices Douglas, *id.* at 730 (Douglas, J., concurring), and Brown, *id.* at 732 (Brown, J., concurring). The Ohio Constitution provisions discussed by the *Brady* court included: Article I, § 2 (Equal Protection); Article I, § 5 (Trial by Jury); Article I, § 16 (Open Courts). The texts of these provisions are set forth in the Appendix to this Article.

20. *Id.* at 728. This section of the Ohio Constitution provides, in applicable part, that: "Laws may be passed fixing and regulating the hours of labor . . . and providing for the comfort, health, safety and general welfare of all employees . . . ." OHIO CONST. art. II, § 34.

analysis determining that the legislature could not enact a law governing intentional torts which occur within the employment relationship as, by definition, such torts are beyond the scope of employment.[21] The effect of this rationale upon the latest effort to limit intentional tort doctrine remains to be seen.[22] It is at least possible that the current statute will fall under a *Brady* analysis. This would be both unfortunate and incorrect. Defining a cause of action is within the legislative power, as is the right to increase the standard of proof necessary to establish a prima facie claim.[23] The new statute reflects a legislative belief that the judicial definition of intentional tort is overly broad and that employers are entitled to the benefits of immunity conferred by Article II, Section 35 of the Ohio Constitution unless their actions are deliberately calculated to cause injury. This approach is consistent with the historical antecedents of the intentional tort doctrine. The Ohio Supreme Court itself has observed that an exception for an employer's "willful act" had long been recognized.[24] The legislative mandate of "deliberate intent" is more consistent with the history of this exception to workers' compensation immunity than is the court's "substantial certainty" test.[25]

The *Brady* decision fails to reflect a considered majority analysis. Similarly, although a more explicit part of the decision, the constitutional discussion found in *Morris* also fails to provide a majority opinion.[26]

---

21. *Brady*, 576 N.E.2d at 729.

22. Intentional tort actions in the employment context are permitted where there is clear and convincing evidence of an employer's intentional tort. OHIO REV. CODE ANN. § 2745.01(B) (Anderson 1995). An intentional tort is defined as "an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease, or death of an employee." *Id.* § 2745.01(D)(1). The section reflects a legislative intent to alter the elements of an employee's intentional tort action by making it more difficult to establish such claims. Duckworth v. Creative Interglobal, Inc., No. 65449, 1994 Ohio App. LEXIS 1888 (Cuyahoga County May 5, 1994), *rev'd*, 655 N.E.2d 1299 (Ohio 1995).

23. There is no vested right in the rules of the common law.

> [W]e have consistently held that the legislative branch of state government, unless prohibited by constitutional limitations, may modify or entirely abolish common-law actions. . . . "[T]here is no property or vested right in any of the rules of the common law . . . and they may be added to or repealed by legislative authority."

Strock v. Pressnell, 527 N.E.2d 1235, 1241 (Ohio 1988) (quoting Leis v. Cleveland Ry. Co., 128 N.E.2d 73 (Ohio 1920) (syllabus)). *Accord* Munn v. Illinois, 94 U.S. 113, 134 (1877). In *Strock*, the court upheld the statutory abolition of the common law actions of alienation of affection and criminal conversation.

24. *Brady*, 576 N.E.2d at 725.

25. Older decisional law and prior statutes focused on willful acts or failure to comply with lawful requirements designed to protect the employee. *See, e.g.*, Greenwalt v. Goodyear Tire & Rubber Co., 128 N.E.2d 116, 119 (Ohio 1955) (employee could not maintain common law action of deceit against employer who had complied with statute), *overruled in part by* Vandemark v. Southland Corp., 525 N.E.2d 1374 (Ohio 1988); Bevis v. Armco Steel Corp., 102 N.E.2d 444, 448 (Ohio 1951) (no right to recover where employer had complied with Workmen's Compensation Act); Mabley & Carew Co. v. Lee, 193 N.E. 745, 747 (Ohio 1934) (under Article II, § 35 of Ohio Constitution, employer not liable in damages for injuries to employees where employer contributes to state workmen's compensation fund).

26. Only two of the justices who decided *Morris* remain on the bench: Chief Justice Thomas Moyer and Justice Alice Robie Resnick. Justice Thomas Douglas did not participate in the *Mor-*

In *Morris*, the defendant admitted malpractice liability and challenged only the amount of damages.[27] The jury, in the underlying federal action, returned a verdict in excess of two million dollars. The district court certified several issues to the Ohio Supreme Court as to the constitutionality, under the Ohio Constitution, of Ohio Revised Code section 2307.43 which limited general damages in medical claims to two hundred thousand dollars ($200,000) and the limitations on collateral benefits set forth in Ohio Revised Code section 2305.27. A highly divided court[28] addressed each issue. The discussion below focuses on the ruling addressing the damages award limitation.[29]

The plurality opinion, joined by Chief Justice Moyer, held that the monetary ceiling violated the due process clause, and questioned its validity under an equal protection analysis. Relying on well-established principles, the court recognized that its due process review would uphold the legislation "(1) if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and (2) if it is not unreasonable or arbitrary."[30] As the statute did not involve a fundamental right or a suspect class, the plurality also determined that its equal protection review would uphold the legislation if "there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective."[31]

The legislative purpose was to limit the then rising medical malpractice insurance rates. That such rates had been increasing dramatically was unquestioned. However, nothing before the court provided "any evidence to buttress the proposition that there is a rational connection between awards over $200,000 and malpractice insurance rates."[32]

The opinion also approved an appellate court decision holding that the monetary cap, imposed upon a class of the most severely injured malpractice victims, was both irrational and arbitrary.[33] Thus, in part because of the legislative failure to provide adequate reasoning and history and in part because

---

ris decision. These three, along with Justice Francis E. Sweeney, who remains on the bench as well, also decided *Sorrell*.

27. Morris v. Savoy, 576 N.E.2d 765, 767 (Ohio 1991).

28. *Id.* at 773. Reflected in a three justice plurality, a concurrence by a member of the plurality, a separate concurrence in part and dissent in part, and two justices joining in a second partial concurrence and partial dissent.

29. Section 2307.43 provided that "[i]n no event shall an amount recovered for general damages in any medical claim . . . not involving death exceed the sum of two hundred thousand dollars." OHIO REV. CODE ANN. § 2307.43. Discussion of the rulings bearing upon the statutory limitations upon the collateral source rule, *id.* § 2317.45, is not necessary because this aspect of the decision was so severely questioned as to be effectively overruled in Sorrell v. Thevenir, 633 N.E.2d 504, 512 (Ohio 1994).

30. *Morris*, 576 N.E.2d at 769.

31. *Id.* at 770 (quoting Denicola v. Providence Hosp., 387 N.E.2d 231, 234 (Ohio 1979)).

32. *Id.* The court further noted that available evidence supported a converse conclusion due to the small number of cases in which awards over $100,000 were made and that even the Insurance Service Organization had indicated that a cap on noneconomic damages would provide only marginal benefit to the industry. *Id.* at 770-71.

33. *Id.* at 771 (citing Nervo v. Pritchard, No. CA-6560, at 8 (Ohio Ct. App. June 10, 1985)).

of a classification which limited potential recovery only for those most seriously injured, the statute was deemed to violate both prongs of the due process test.

The ease with which the plurality found the ceiling irrational within the context of malpractice victims made it quite logical to then find that any distinctions within the class of medical malpractice victims had to violate equal protection. The plurality opinion, although suggesting such a result, does not so hold. The distinction between medical malpractice claimants and other tortiously injured claimants, in and of itself, did not require nullification under an equal protection standard. Indeed, the court had previously upheld limitations on malpractice experts contained in related legislation as that law furthered a legitimate legislative objective.[34]

This medical malpractice statute was flawed in three respects. First, it did not apply to wrongful death actions. This flaw was not rectified by the fact that the Ohio Constitution prohibits any limitation on wrongful death compensatory damages.[35] Second, "the statute treats the most seriously injured malpractice victims differently from the rest of the class."[36] Third, it distinguished medical malpractice victims from all other tortiously injured persons. As the statute had to be upheld under a rational basis test if it was supported by "any conceivable set of circumstances," the plurality "stopped short" of finding an equal protection violation.[37]

Justice Sweeney's opinion in *Morris*[38] presents an analysis far more severe than that of the plurality in that he would apply strict scrutiny analysis and would also find a violation of the right to trial by jury. On this approach, it is the right to trial by jury which is not only violated but which makes it possible to apply a more stringent standard of review to both equal protection and due process analyses.

Article I, Section 5 of the Ohio Constitution mandates that the right to trial by jury shall be "inviolate."[39] This right is, therefore, a fundamental and substantive right.[40] In this case the jury award of general damages would be reduced by over $700,000 to comport with the statutory mandate. To enforce the statute would be to substitute the judgment of the General Assembly for that of the jury and would, therefore, substantially impair the right to trial by

34. *Id.* at 771 (citing Denicola v. Providence Hosp., 387 N.E.2d 231, 234 (Ohio 1979) (upholding constitutionality of limitations on qualifications of medical malpractice experts under Ohio Rev. Code § 2743.43)).

35. *Id.*

36. *Id.* at 772. As there was no evidence to support the contention that this limitation would ease the burden of exorbitant awards, the plurality also refused to assume that an amount in excess of $200,000 was exorbitant. *Id.*

37. *Id.*

38. *Id.* at 777 (Sweeney, J., concurring in part and dissenting in part).

39. The term "inviolate" means "free from substantial impairment." *Id.* at 779 (Sweeney, J., concurring in part and dissenting in part).

40. *Id.* at 778 (relying on Kneisley v. Lattimer-Stevens Co., 533 N.E.2d 743, 746 (Ohio 1988) (right to trial by jury is substantive right) and Cleveland Ry. Co. v. Halliday, 188 N.E. 1, 3 (Ohio 1933) (right to trial by jury is fundamental right)).

jury. That this is a substantial impairment of the right rather than a mere limit on damages is due to the fact that under prior law the right is to "have the jury determine factual issues *and assess damages*."[41]

Because the statute interferes with the fundamental right to trial by jury, due process analysis of the statute should be made pursuant to strict scrutiny so that it can be upheld only upon evidence that it furthers a compelling government interest.[42] As the statute failed under the more liberal approach taken by the plurality, it is evident that it fails under this more stringent test. Similarly, since all malpractice victims whose damages exceed $200,000 are deprived of the fundamental right to trial by jury, the plurality erred in its application of a rational basis standard. The ceiling violates equal protection under either approach.[43] Of some significance is Justice Sweeney's assertion that "the analyses for due process and equal protection are identical, and that the only substantial difference between substantive due process and equal protection is that legislation reviewed under equal protection always involves a classification."[44]

Perhaps the most significant aspect of the concurring and dissenting opinions is that both recognized the right to trial by jury as a fundamental and substantive right. Not only does this right apply to a wide variety of tort actions, including product liability actions, such a conclusion supports a most stringent analysis under both due process and equal protection. This approach could have great effect upon the retention of joint and several liability for economic loss despite a jury determination predicated on comparative negligence.[45]

The constitutional validity of Ohio Revised Code section 2317.45 was revisited in *Sorrell v. Thevenir*.[46] Three of the four current Justices concurred in a majority opinion which reiterated the principle that the right to trial by jury is a fundamental right. This right applies to all claims which existed at the time the Ohio Constitution was adopted and, therefore, includes both battery and negligence actions. The majority reasoned that the power given to the court to reduce the jury award was inconsistent with the

---

41. *Id.* at 779.

42. This standard is utilized as the "due course of law" provision contained in Article I, § 16 of the Ohio Constitution and is equivalent to the federal standard of "due process of law." *Morris*, 576 N.E.2d at 780 (Sweeney, J., concurring in part and dissenting in part).

43. *Id.* at 781 (Sweeney, J., concurring in part and dissenting in part).

44. *Id.* at 781-82 (Sweeney, J., concurring in part and dissenting in part). Justice Sweeney also addressed the open courts and special privileges provisions of the Ohio Constitution. *Id.* at 782-83. This Article will not address the special privileges provision.

45. See *infra* Part III.C.1 for further discussion of this issue.

46. 633 N.E.2d 504 (Ohio 1994). Section 2317.45 of the Ohio Revised Code provided, inter alia, that various collateral benefits which had been received by a plaintiff, or which would be received within 60 months after judgment in a tort action, including a product liability action, had to be disclosed to the court. The jury would not be aware of this evidence or its legal effect. OHIO REV. CODE ANN. § 2317.45(B)(3). If there were no rights of recoupment regarding those payments, the court would reduce the judgment accordingly. *Id.* § 2317.45(B)(2).

jury's right to make all fact-findings and to provide a full recovery.[47] In this case the application of the statute did not merely prevent a double recovery, it eliminated the entire jury award.[48] Thus the statute violated the right to trial by jury.

The statute also violated due process of law under a strict scrutiny standard. Strict scrutiny was applicable because the right to trial by jury was a fundamental right. This bootstrap operation allowed the court to void the statute absent a showing that it was necessary to promote a compelling governmental interest.[49] The court did not suggest that there is a fundamental right to retain all collateral benefits or to the collateral benefit rule as announced in prior law.[50]

Due to the absence of adequate empirical evidence as to whether the statute would reduce the so-called "insurance crisis," this legislation failed the compelling interest test.[51] Moreover, it did not satisfy even the less stringent standard previously suggested in *Morris* because it did not bear a real and substantial relationship to health, safety, morals, or general welfare, and was unreasonable and arbitrary. The statute was an unreasonable and arbitrary means to prevent double recovery, an otherwise valid legislative goal, as it did not take into account whether the damages found by the jury included those for which compensation had been awarded by payments from collateral sources.[52]

The same reasoning which led to application of strict scrutiny in regard to due process was applied to the court's equal protection analysis.[53] Thus a statutory classification which treated collateral source payments in medical malpractice claims[54] differently than in all other tort claims could not promote a compelling government interest predicated on eliminating double re-

47. *Sorrell*, 633 N.E.2d at 514.

48. *Id.* at 506. The jury entered judgment for $10,128 including $5,000 for pain and suffering. Plaintiff had recovered over $14,000 in workers' compensation benefits and, therefore, the judgment was reduced to zero. Application of the statute, which did not distinguish between economic loss and noneconomic loss, prevented double recovery as to $5,128, but also, on the court's approach, negated the pain and suffering award. *Id.* at 506, 511.

49. *Id.* at 511.

50. *Id.* The Ohio Supreme Court adopted the collateral source rule in Pryor v. Webber, 263 N.E.2d 235, 238 (Ohio 1970).

51. *Sorrell*, 633 N.E.2d at 511.

52. *Id.* The court also found "persuasive" an assertion of *amicus*, the Ohio Academy of Trial Lawyers (a plaintiff-oriented professional organization), that in many cases there was no double recovery as the plaintiff merely gained the benefit of his or her bargain with an insurance company. The logical extension of this argument would preclude any abrogation of the collateral source rule as all such benefits are contractually based whether paid for by the individual, an employer, or another third party.

53. *Id.* at 512. *Cf.* Brookbank v. Gray, 658 N.E.2d 724, 731 (Ohio 1996), where, in dicta, the court applied an intermediate scrutiny test for its equal protection analysis of a possible interpretation of the Wrongful Death Act. Both decisions applied the equal protection clause of Article I, § 2 of the Ohio Constitution.

54. *See* Morris v. Savoy, 576 N.E.2d 765, 772 (Ohio 1991) (upholding Ohio Rev. Code § 2305.27 as constitutional). The viability of the *Morris* holding is now "questionable at best." *Sorrell*, 633 N.E.2d at 512.

coveries, especially where "the statutory classifications are established in response to a crisis that has not clearly been established to have existed."[55] Adopting the reasoning of *amicus* Ohio Academy of Trial Lawyers, the court concluded that if there were an insurance crisis it would affect all tort defendants and that there was no rational reason to distinguish between malpractice tort defendants and other defendants.[56] In essence, similarly situated persons were treated differently due to the distinctions between sections 2317.45 and 2305.27 of the Ohio Revised Code.

Finally, the majority explored Article I, Section 16 of the Ohio Constitution, the open courts provision. This provision mandates a meaningful remedy and protects the right to execute upon a properly rendered judgment. Here, the judgment was impinged upon and the right of action rendered meaningless. The statute does not abolish the right of action and of access to the courts, but it hinders "the fundamental right of victims to obtain satisfaction for injuries or damages sustained."[57] Once again the court stressed the right to a jury trial as a means to void the statute in that it observed that for tort victims such as these plaintiffs the statute "undermines" the right to a trial by jury.[58]

The pervasive theme in the *Sorrell* decision, as in much of the court's reasoning in other decisions, is the right to trial by jury. Nevertheless, consistent with the language and reasoning of the opinion, a legislative abrogation of the collateral source rule remains possible. Whether the court would allow any such effort to stand remains untested.[59]

Chief Justice Moyer dissented on the strength of *Morris*, and refuted several key aspects of the majority opinion. He reasoned that plaintiffs will always receive full compensation as measured by the jury. Voiding the stat-

---

55. *Sorrell*, 633 N.E.2d at 512 (citation omitted).

56. *Id.* This line of reasoning is deeply flawed as it ignores important distinctions made in the setting of insurance premiums that focus on occurrences and distinguish between types of coverage—general liability, professional malpractice, product liability, and more—as well as distinctions within such areas: e.g., neurosurgeons v. obstetrician gynecologists, automobile manufacturers v. power tool manufacturers v. non-power tool manufacturers. Moreover, the need for the professional services of medical experts, who serve in a regulated profession, distinguishes this type of defendant from many other tortfeasors. *See generally* Denicola v. Providence Hosp., 387 N.E.2d 231 (Ohio 1979).

57. *Sorrell*, 633 N.E.2d at 513.

58. *Id.*

59. This possibility is discussed *infra* Part III.B.4. The court has upheld an abrogation of the collateral source rule where the defendant was a political subdivision. *See* Buchman v. Board of Educ., 652 N.E.2d 952, 958 (Ohio 1995) (upholding Ohio Rev. Code § 2744.05(B), and finding future collateral benefits are deductible from jury's verdict). This decision places considerable reliance on the unique nature of political subdivisions. *Accord* Fahnbulleh v. Strahan, 653 N.E.2d 1186, 1189 (Ohio 1995) (limited immunity provided by Ohio Rev. Code § 2744.05(B)(1)); Meneffe v. Queen City Metro, 550 N.E.2d 181, 183 (Ohio 1990) (upholding protection of political subdivisions against subrogation under Ohio Rev. Code § 2744.05(B)). These and similar decisions, based on the unique needs of political subdivisions, have no valid application to tort claims against individual or business defendants.

ute would allow a windfall to plaintiffs.[60] Here, for example, the jury award (including pain and suffering) was less than that which the plaintiff had already received from collateral sources. As a result of the majority decision the plaintiff would receive more than double what the jury believed to be full compensation for the injury sustained. The majority approach creates two liabilities, doubles the exposure, and increases the costs to all who purchase liability insurance.[61] The Chief Justice, in a somewhat unique and well-reasoned opinion, recognized that abrogating the setoff would violate defendants' rights.[62]

The overwhelming importance to Ohio jurisprudence of the right to trial by jury is further manifested in *Zoppo v. Homestead Insurance Co.*[63] This decision addressed the remedy available to an insured who brought a bad faith claim against its insurance carrier. Part of the judgment included punitive damages which were set by the court after a jury finding that such damages should be awarded pursuant to Ohio Revised Code section 2315.21(C)(2).[64] As a foundation for its ruling that this statute violated the right to trial by jury, the court reviewed the history of punitive damages to conclude that they existed as part of the common law, and thus fell within the purview of the constitutional right which "cannot be invaded or violated by either legislative act or judicial order or decree."[65] The common law right to have the jury determine such damages was abrogated by the statute and, therefore, violated the right to trial by jury. The court did not address the rationale of the legislature in its enactment of the statute nor the legislative objectives.

This decision, unlike *Sorrell*, finds a majority of the present court membership supporting its result and reasoning with the Chief Justice, however, writing a strong dissent. The focus of the dissent was that although the fundamental right to a trial by jury applied to compensation for the tort-related injury underlying a plaintiff's claim, it did not apply to punitive damages. The jury function is limited to its right to render a complete award of com-

60. *Sorrell*, 633 N.E.2d at 514 (Moyer, C.J., dissenting).

61. *Id.* (Moyer, C.J., dissenting).

62. *Id.* (Moyer, C.J., dissenting). This represents a rare judicial indication that the right to trial by jury and the sanctity of the jury verdict may be a proverbial two-edged sword. It supports the argument set forth *infra* Part III.C.1, that application of joint and several liability to a judgment predicated on comparative fault is a violation of the right to trial by jury.

63. 644 N.E.2d 397 (Ohio 1994), *cert. denied*, 116 S. Ct. 56 (1995).

64. *Id.* at 401. This section of the code provides that "[i]n a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court." OHIO REV. CODE ANN. § 2315.21(C)(2) (Anderson 1995).

65. *Zoppo*, 644 N.E.2d at 401 (citations omitted). Similar analysis led to the conclusion that prior to adoption of the Ohio Constitution there was no common law action for attorney fees and therefore it was proper for the court to determine the amount of such fees after a jury verdict establishing liability. Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 742 (Ohio 1992).

pensatory damages.[66] This analysis could have far-ranging implications in regard to other constitutional considerations.

The right to trial by jury is complemented by the right to seek a remedy—that is, the open courts provision of the Ohio Constitution.[67] Although this section of the Constitution often serves as an alternate to a result otherwise predicated on equal protection, due process, or the right to trial by jury, it can play an independent and important role. The most important such arena is that of the statute of limitations and, more specifically, statutes of repose.[68] Ohio Revised Code section 2305.131 exemplified a repose statute as it prohibited actions against the designers and architects of improvements to real property which were brought more than ten years after completion of the construction services.[69] The statute was found constitutional in *Sedar v. Knowlton Construction Co.*[70] This ruling, although consistent with prior law, soon met its demise. In *Brennaman v. R.M.I. Co.*,[71] the court overruled *Sedar* and held that a negligence claim could proceed for harm caused by the installation of a valve used in a sodium handling facility. The *Brennaman* court concluded that the repose statute was unconstitutional.[72] Despite pervasive product liability overtones, the court had little difficulty in reaching a determination that the facts involved an improvement to realty within the purview of the statute.[73]

---

66. *Zoppo*, 644 N.E.2d at 404 (Wright, J., dissenting). The *Zoppo* dissent relied upon Justice Scalia's concurrence in Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), in which Justice Scalia had argued that: "State legislatures and courts have the power to restrict or abolish . . . punitive damages." *Pacific Mutual*, 499 U.S. at 39 (Scalia, J., concurring). The importance of this analysis is discussed *infra* Part III.C.3.

67. OHIO CONST. art. I, § 16.

68. A statute of repose is a limitation period which disregards the date of injury as the period commences based upon a predetermined event. Such statutes can preclude a cause of action from being brought before the injured party is (a) injured, or (b) becomes aware of the relationship between an injury and its cause. In contrast, a statute of limitations, when it includes a discovery rule, is a limitation period which runs from an accrual date based on either the day of injury or the time at which the injured party knew or reasonably should have known of the relationship of the defendant to the injury. *See* Berry v. Beech Aircraft Corp., 717 P.2d 670, 672 (Utah 1985).

69. OHIO REV. CODE ANN. § 2305.131.

70. 551 N.E.2d 938, 945-47 (Ohio 1990).

71. 639 N.E.2d 425 (Ohio 1994). Proposed Ohio Rev. Code § 2305.131 is intended to recognize the holdings of *Sedar*, Ross v. Sam W. Emerson Co., 551 N.E.2d 950 (Ohio 1990), Cyrus v. Henes, 623 N.E.2d 1256 (Ohio Ct. App. 1993), and other decisions while repealing the former law in light of decisions such as Ross v. Tom Reith, Inc., 645 N.E.2d 729 (Ohio 1995) and *Brennaman*. *See* Amend. Sub. H.B. 350, § 5(E)(2). Reliance upon *Cyrus* is improper as this decision was reversed, 640 N.E.2d 810 (Ohio 1994). The various subparts of § 5(E) assert that the new repose provision is constitutional and give reasons in support of the provision. Nevertheless, the constitutionality of the new repose statute remains questionable for the reasons discussed *infra* Part III.C.2.

72. *Brennaman*, 639 N.E.2d at 430.

73. *Id.* at 428-30. The constitutional issue would not have arisen had the court determined that this action was a product liability claim. It is difficult to reconcile this analysis with a subsequent ruling that a vapor recovery system used to evacuate gasoline fumes, incorporated into a holding tank system, was tangible personal property within the purview of a product liability

Relying on its prior ruling that the legislature cannot deprive a claimant of a right to remedy "before a claimant knew or should have known of her injury,"[74] the court found that under the contested statute plaintiffs were deprived of this right.[75] The court reiterated that, at a minimum, Article I, Section 16 of the Ohio Constitution requires that an injured party be provided with a reasonable period of time to enter the courthouse to seek compensation. By overruling *Sedar* the majority could reason that "[t]oday we reopen the courthouse doors by declaring that [Ohio Revised Code section] 2305.131, a statute of repose, violates the right to a remedy guarantee. . . ."[76]

III. Application of Constitutional Principles to Key Provisions of House Bill 350

The precedents discussed above reveal the general direction of the Ohio Supreme Court in its constitutional analysis of tort reform legislation. An astute legislative body would recognize that the analysis is largely consistent with a tort law philosophy favoring compensation for injured parties. This philosophy supports many of the court's holdings including those determining that (1) there is a cause of action sounding in strict liability for failure to warn so as to avoid application of comparative negligence principles;[77] (2) the comparative negligence statute cannot be judicially applied to strict liability actions;[78] and (3) merging the defenses of contributory negligence and implied assumption of the risk so as to negate the absolute defense otherwise provided by assumption of the risk.[79] Similar policies and philosophy no doubt supported the court's adoption of the intentional tort doctrine.[80] On the other hand, the court has upheld defense judgments where doing so did

---

claim under Ohio Rev. Code § 2307.71(L). Wireman v. Keneco Dist. Inc., 661 N.E.2d 744, 747 (Ohio 1996). The end result in each case was to permit a cause of action to proceed.

74. *Brennaman*, 639 N.E.2d at 430 (relying on Burgess v. Eli Lilly & Co., 609 N.E.2d 140 (Ohio 1993)).

75. *Id.* The system was installed in 1958 and the injury took place in 1986, with suit filed within the statutory period if the date of injury governed.

76. *Id.*

77. Crislip v. TCH Liquidating Co., 556 N.E.2d 1177, 1180 (Ohio 1990). State and federal courts had interpreted prior Ohio Supreme Court decisions as rejecting such a claim. *See* Overbee v. Van Waters & Rogers, 706 F.2d 768, 770 (6th Cir. 1983) (refusing to recognize action in strict liability for failure to warn, and citing Knitz v. Minster Mach. Co., 432 N.E.2d 814, 818 (Ohio), *cert. denied,* 459 U.S. 857 (1982)); Hardiman v. ZEP Mfg. Co., 470 N.E.2d 941, 944 (Ohio Ct. App. 1984) (under *Knitz*, claimant may not use strict liability theory to recover for manufacturer's or seller's failure to warn).

78. Bowling v. Heil Co., 511 N.E.2d 373, 377 (Ohio 1987). This despite the fact that in Wilfong v. Batdorf, 451 N.E.2d 1185, 1188 (Ohio 1983), *overruling in part*, Viers v. Dunlap, 438 N.E.2d 881 (Ohio 1982), a common law comparative negligence standard was adopted for similar cases arising before the statute's effective date. This enabled the court to give injured parties the equivalent of the statutory protections without running afoul of the prohibition against giving retroactive effect to substantive legislation.

79. Anderson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983).

80. See *supra* notes 16-25 and accompanying text for a discussion of the intentional tort doctrine.

not endanger pro-plaintiff legal principles[81] and has taken a conservative approach in regard to extension of general corporate liability theories in product liability actions.[82]

The legislative branch, at least in theory, knows the extent to which it has the power to act, and that the judiciary alone has the authority to determine constitutional issues. Where the tort reform legislation seeks to impose the General Assembly's view of the constitution upon the court—as it does in several key places[83]—the effort is not only misguided, it is futile. In these areas, battle is truly joined.

The decisions of the court, however, also made manifest the possibility of constitutionally valid reform in many areas provided only that the legislation be drafted with sufficient circumspection. The ultimate question then becomes the extent to which this legislation reflects an accurate understanding of the Ohio Constitution as interpreted by the Ohio Supreme Court. Appreciation for judicial precedents should enable one to predict, with some degree of accuracy, the fate of key provisions of the General Assembly's latest tort reform efforts.[84]

A. Proposed Provisions That Should Raise No Serious Constitutional Dimension

Although some may seek to attack virtually any section of the 1996 Tort Reform Act, such attacks are not worthy of serious consideration in regard to several important changes. These sections, viewed objectively, address subjects well within the legislative prerogative which do not impinge upon a

---

81. *See, e.g.*, Grover v. Eli Lilly & Co., 591 N.E.2d 696, 700-01 (Ohio 1992) (refusing to impose liability for alleged DES-related injury where drug was ingested by grandparent); Freas v. Prater Const. Corp., 573 N.E.2d 27, 31 (Ohio 1991) (warning adequate as matter of law); Menifee v. Ohio Welding Prods., Inc., 472 N.E.2d 707, 711 (Ohio 1984) (upholding judgment based on misuse and absence of foreseeability in product liability action because to do otherwise would impose insurer liability). The court has recognized that not every wrong deserves a remedy. *See* Heiner v. Moretuzzo, 652 N.E.2d 664, 670 (Ohio 1995) (refusing to allow recovery for emotional distress claim where physical peril to claimant was nonexistent).

82. *See, e.g.*, Horton v. Harwick Chem. Corp., 653 N.E.2d 1196, 1203 (Ohio 1995) (rejecting use of alternative liability theory absent showing that defendant's products posed substantially similar risk of harm); Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1133 (Ohio 1993) (limiting successor corporate liability to few well-delineated exceptions); Schump v. Firestone Tire & Rubber Co., 541 N.E.2d 1040, 1044 (Ohio 1989) (rejecting dual capacity doctrine); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 700 (Ohio 1987) (refusing to impose market share liability on asbestos industry because of varying degrees of harm imposed by different asbestos products). No effort has been made here to present the totality of decisional law bearing on the court's tort philosophy. It is hoped that the reader has been provided with a case sampling of sufficient breadth as to permit independent evaluation of its relevance.

83. See *infra* notes 149-58, 177-88 and accompanying text for examples.

84. The task is difficult due to the fact that the court exhibits little adherence to the principle of stare decisis. As previously noted, *Sorrell*, in effect, overruled *Morris*; *Brennaman* expressly overruled *Sedar*; and *Wilfong* expressly overruled *Viers*. The time frame for each of these reversals was less than four years. *See also* Gallimore v. Children's Hosp. Medical Ctr. 617 N.E.2d 1052, 1060 (Ohio 1993) (allowing parent's claim for loss of filial consortium), *overruling in part*, High v. Howard, 592 N.E.2d 818 (Ohio 1992).

party's access to the courts or to a trial by jury. Moreover, they do not raise improper classifications for purposes of equal protection analysis nor do they implicate due process concerns. In these areas the General Assembly has exercised its authority to modify legal principles based on its perception of the facts and its policy concerns. Among the most important provisions are those which (1) define defect; (2) codify limitations upon corporate liability; (3) impose greater responsibilities upon injured parties; and (4) refine aspects of punitive damages liability.

1. Defining Defect

Perhaps the most controversial of the changes which do not raise constitutional issues is the elimination of the consumer expectancy test as a means to define a design or formulation defect. This is done through the simple expedient of deleting the definition from Ohio Revised Code section 2307.75(A)(2). When strict liability was originally enunciated its defect definition was the consumer expectancy test.[85] Ohio, following the lead of California, soon adopted an alternative definition based on risk-benefit analysis and allowed a jury to find the existence of a defect under either definition.[86] This dual definition was codified in Ohio Revised Code section 2307.75(A)(2).[87]

The use of a single definition for design defect litigation is eminently sound and properly recognizes that liability for manufacture defect and for design defect can rest on different premises. Society most benefits when a manufacturer ascertains and provides optimum safety as distinct from abso-

85. *See* Temple v. Wean United, Inc., 364 N.E.2d 267, 271 (Ohio 1977) (adopting Restatement definition of strict liability in tort pursuant to § 402A); State Farm Fire & Casualty Co. v. Chrysler Corp., 523 N.E.2d 489, 494 (Ohio 1988) (defining product as defective under consumer expectancy test if it is more dangerous than would be expected by ordinary individual using product in foreseeable or intended manner); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1960) (implicit in product's presence in marketplace is assumption by consumers that product is safe and without defect). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i. (1965) (to be unreasonably dangerous, product must be more dangerous than any ordinary consumer would otherwise expect). See *supra* note 11 for the pertinent portion of the Restatement (Third) of Torts § 2 rejecting this standard. Shortly after its adoption, this definition was subjected to extensive analysis and criticism. *See, e.g.*, Michael Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 SW. U. L. REV. 109, 114-15 (1976) (discussing ambiguity of term "defect"); W. Page Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 300-05 (1979) (criticizing consumer expectation test as fundamentally flawed); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 471-81 (1979) (recognizing merits to consumer expectation standard while indicating difficulties with definitions of consumer and ordinary expectations).

86. *See* Cremeans v. International Harvester Co., 452 N.E.2d 1281, 1284 (Ohio 1983). In *Knitz v. Minster Machine Co.*, the court recognized that in some situations consumers lacked the knowledge necessary to determine how safe a product could be made and therefore no consumer expectancy could exist. Knitz v. Minster Mach. Co., 432 N.E.2d 814, 818 (Ohio), *cert. denied*, 459 U.S. 857 (1982). *See also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. c (Tent. draft No. 2, 1995) (discussing adoption of risk-utility balancing test as standard for determining defective designs).

87. OHIO REV. CODE ANN. § 2307.75(A)(2).

lute safety. This legislation recognizes the inability of the average consumer to have a reasonable expectancy as to product design while it is quite possible to have such an expectancy as to manufacture defect. The need for proof of an alternative design[88] will also bring objective evidence to the jury and support a fair determination of whether a design defect existed. There are ample reasons for this modification which does not adversely affect the function of the jury. Rather, this change in definition requires the jury to engage in a sophisticated, fact driven, balancing test.[89] That this process may have a significant bearing on case resolution is not relevant to its constitutionality.[90]

Nevertheless, attacks predicated on due process may be brought as well as claims that this redefinition impinges upon the right to trial by jury. Assuming a due process claim, the legislation can readily be defended on the ground that it maximizes safety while promoting product evolution and sales.[91] A trial by jury attack can be made only if there is somehow a constitutional right to use of a consumer expectancy definition. As the definition did not come into effect until 1977, it is difficult to see this as a constitutional right.[92]

2. Successor Liability

Proposed section 2307.73(C) provides that a manufacturer is not liable based on a product liability claim that asserts successor corporate liability in the context of a sale of assets unless there is evidence which establishes the existence of one of the traditional exceptions to successor corporate liability (contractual assumption of liability, de facto merger or consolidation, mere continuation, or liability avoidance).[93] The statute would appear to close the door to expansive theories of liability.[94] The language allowing liability when a sale of assets was for the "primary purpose of avoiding liability" appears to

88. *See id.* § 2307.75(F) (allowing manufacturer to defend design defect claim by proving no feasible alternative design was available at time product left manufacturer's control).

89. In some respects, risk-benefit analysis, a determination of whether a product presents excessive preventable risk of harm, represents a modern application of the negligence calculus described in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

90. As previously noted, there is no vested right in a common law action. See *supra* note 23 and accompanying text.

91. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmts. a, c (Tent. Draft No. 2, 1995), for an excellent summation of the reasons which justify the use of this test rather than that of consumer expectancy.

92. Temple v. Wean United, Inc., 364 N.E.2d 267, 271 (Ohio 1977) (adopting text and comments from Restatement (Second) of Torts § 402A as Ohio law). *See also* Lonzrick v. Republic Steel Corp., 218 N.E.2d 185, 192-93 (Ohio 1966), in which the court adopted a form of strict liability in warranty without privity which set the foundation for *Temple*.

93. Sub. H.B. 350 § 2307.73(C). This is consistent with, and largely a codification of, decisional law. *See* Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331, 334, 337 (Ohio 1987) (reiterating standard exceptions and rejecting expansion of liability under product line exception announced in Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977)).

94. The door to such an expansive approach was arguably left open in decisions such as Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129 (Ohio 1993). In *Welco*, the court declined to expand theories of established successor liability because of the contractual nature of the asset

be a reference to the traditional rule imposing liability based on fraud. If fraud-based liability is not allowed the section would reflect poor legislative judgment, but it would not raise a constitutional issue.

3. Industry-Wide Liability

Proposed section 2307.791 similarly seeks to codify existing law and limit corporate liability by excluding various theories of expanded industry-wide corporate liability.[95] Industry-wide or enterprise liability is permitted only where there has been both joint awareness of a risk and joint development of safety standards or delegation of safety functions to a given entity.[96] Alternative liability is permitted only when all possible tortfeasors are named and subject to jurisdiction.[97] This approach is consistent with application of current Ohio Supreme Court decisions.[98]

4. Substance Abuse

Proposed section 2323.59 will create a limited substance abuse defense.[99] Defendants in many tort actions, particularly product liability cases sounding in strict liability, have often been foreclosed from presenting evidence that a claimant's injury was caused, at least to some extent, by substance abuse. This problem is most evident in crashworthiness (second collision) litigation where the theory of the case is that the cause of the underlying occurrence is irrelevant. Allowing a substance abuse defense is consistent with the position that the total circumstances surrounding an injury, including the conduct of all possible parties even if they are not before the court, is appropriate for jury consideration.

Where applicable this statute would, based upon a preponderance of the evidence, establish an inference that a plaintiff's drug or alcohol abuse was "the" proximate cause of the injury sustained.[100] The inference is rebuttable by clear and convincing evidence that the abuse was not the proximate cause

---

purchase. *Id.* at 1133. However, the court's opinion appeared to leave open the possibility of expansion in this area given the right factual predicates.

95. Sub. H.B. 350 § 2307.791.

96. *Id.* § 2307.791(A)(1), (2).

97. *Id.* § 2307.791(B).

98. For example, Horton v. Harwick Chem. Corp., 653 N.E.2d 1196 (Ohio 1995), a multi-defendant asbestos case, required plaintiff to prove that the plaintiff was exposed to the defendant's product and that its product was a substantial factor in causing the injury. *Id.* at 1203. Moreover, absent substantially similar risk of harm caused by each product, the principle of alternative liability cannot be applied. A seminal case in the area, Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987), rejected application of any form of market share liability to asbestos manufacturers because of the variability of risks posed by asbestos products. As in *Horton*, the *Goldman* court appeared to leave the door open to market share liability in an appropriate case. *Id.* at 697. The statute would close that door. Proposed § 2307.791(B) was intended to codify an "essential element" of alternative liability theory as enunciated in *Goldman* and in Minnich v. Ashland Oil Co., 473 N.E.2d 1199 (Ohio 1984). *See* Sub. H.B. 350 § 4(Q).

99. Sub. H.B. 350 § 2323.59.

100. *Id.* § 2323.59(B).

of the harm.[101] This approach is consistent with the expansion of comparative principles as it permits a fact-finder to consider the totality of the circumstances which led to the injury for which plaintiff seeks recovery.[102]

5. Product Recalls

Proposed section 2307.80 will permit a manufacturer or supplier to introduce evidence that a product owner failed to heed notice of a product recall as defined in new section 2307.71(N).[103] The statutory prerequisites for submission of such evidence parallel those available to a plaintiff seeking to admit evidence of a recall. The evidence must establish that (1) the recall preceded accrual of the cause of action; (2) the recall must address a defective aspect of the product that the claimant alleges was a cause of the harm for which recovery is sought; (3) the purchaser or lessee of the product had a reasonable time to comply with the recall; and (4) the harm that was allegedly caused by the defective product would likely not have occurred.[104] The jury may then consider this evidence in regard to assumption of the risk where the claimant and the purchaser or lessee are the same person or as superseding cause where they are different. Moreover, the jury may consider the existence of a relevant recall as some evidence as to the absence of the flagrant conduct needed to establish a base for imposition of punitive damages.[105]

In terms of the plaintiff's cause of action, the proposed provision is consistent with existing decisional law as it permits a plaintiff to submit evidence of a relevant recall to establish an inference that the defective aspect of the product existed at the time the product left the control of the manufacturer.[106] Similarly, this provision reflects decisional law which limits the use of recall campaign evidence to areas such as ownership or control at the time the defect came into existence, impeachment, and feasibility of change.[107]

---

101. *Id.* By recognizing abuse as "the" cause of harm the proposal creates an ambiguity. Part III.C. *infra* makes clear that the finding should be utilized within the parameters of comparative negligence. However, if the abuse was "the" cause of harm as distinct from "a" cause of harm, the result must be a dismissal of the action. OHIO REV. CODE ANN. § 2307.73(A)(2). Section 2307 demands that the defective product be "a" proximate cause of the harm for which recovery is sought. It is possible to resolve the ambiguity by reading the sections as mandating dismissal where plaintiff was the driver and substance abuser and as requiring comparative analysis when plaintiff is a third party. A more appropriate approach would be to view substance abuse as "a" factor in all cases.

102. A similar provision was found in § 103 of "The Common Sense Product Liability and Legal Reform Act of 1995" (H.R. 956), which was vetoed by President Clinton on May 2, 1996 [hereinafter "Federal Act"].

103. Sub. H.B. 350 § 2307.71(N).

104. *Id.* § 2307.80(A).

105. *Id.* § 2307.80(B)(3).

106. *Id.* § 2307.80(C).

107. Amend. Sub. H.B. 350 § 2307.80(D). *Cf.* Anderson v. Whittaker Corp., 894 F.2d 804, 813 (6th Cir. 1990) (allowing recall evidence on issue of causation); Calhoun v. Honda Motor Co., 738 F.2d 126, 133 (6th Cir. 1984) (affirming trial court's decision to exclude recall letter where claimant failed to lay adequate foundation).

This new provision does no more than codify the main elements of generally recognized decisional law and provide for the equivalent use of evidence by the defense. Inasmuch as recalls, whether voluntary or compelled, are of great benefit to the safety of the public and can normally be complied with by consumers at a minimum cost in terms of dollars, time, and inconvenience, it is reasonable to demand that the public heed such notifications or suffer the consequences.[108] This section reflects simple justice by imposing mutuality of obligation upon the parties: that is, the manufacturer must recall and the consumer must heed.

6. Seat Belts

Existing law allows for the "seat belt defense" only in crashworthiness actions against manufacturers, designers, distributors, and sellers of passenger vehicles.[109] Despite its power to extend this defense to other tort actions, the court has refused to do so.[110] The proposed amendment to this statute will extend the defense to all tort actions, including product liability claims,[111] so that the fact-finder may diminish the available compensatory damages in accord with sections 2315.19 and 2315.20 of the Ohio Revised Code.[112] This extension is consistent with the public policy advocating the use of seat belts as a means to prevent injury. Broader application of the seat belt defense should encourage greater use of restraining devices and is, therefore, in the best interests of society. This extension of existing law should withstand constitutional scrutiny.[113]

7. Punitive Damages (Without the Monetary Cap)

With the exception of its effort to impose a ceiling on punitive damages, the legislature's modification of punitive damages law in the context of a product liability action should withstand constitutional scrutiny. The legislation restores the full function of the jury in determining liability for, and the amount of, such damages[114] subject to the ceiling set forth in section 2315.21

108. The duty to read and heed warnings is well recognized. *See* Crislip v. TCH Liquidating Co., 556 N.E.2d 1177, 1180 (Ohio 1990); *cf.* Hardiman v. ZEP Mfg. Co., 470 N.E.2d 941, 945 n.2 (Ohio Ct. App. 1984) (failure to read did not automatically foreclose recovery).

109. OHIO REV. CODE ANN. § 4513.263(F) (Anderson 1995).

110. *See* Vogel v. Wells, 566 N.E.2d 154, 159 (Ohio 1991).

111. Sub. H.B. 350 § 4513.263(A)(7).

112. *Id.* § 4513.263(F).

113. The current seat belt provision was upheld against assertions of due process and equal protection violations in Bendner v. Carr, 532 N.E.2d 178, 181-82 (Ohio Ct. App. 1987). While upholding the constitutionality of the current provision, the court found it significant that the legislature specifically excluded evidence of seat belt use in negligence actions. *Id.* at 181. The reasoning and holding of *Bendner* are equally applicable to the extension of the defense to all tort actions. *Accord* State v. Stouffer, 276 N.E.2d 651, 654 (Ohio Ct. App. 1971) (upholding a subsequently repealed mandatory motorcycle helmet use law.).

114. See *infra* Part III.C.3 for a discussion of Sub. H.B. 350 § 2307.801. This section amends and replaces former § 2307.80 as that section number will refer to the recall provisions. See *supra* Part III.A.5 for a discussion of product recall.

of the Ohio Revised Code.[115] Although much of the former statute remains, its previous violation of the right to trial by jury has been obviated.[116]

Two significant additions to the statute are made in the legislation. First, the protections previously given to manufacturers of ethical drugs will be extended to manufacturers of medical devices and over-the-counter drugs marketed pursuant to federal regulation.[117] Within this regulated industry, the extension should pose no constitutional difficulty. Second, the new legislation provides that a manufacturer or supplier of products other than drugs or medical devices shall not be liable for punitive damages if the manufacturer or supplier fully complied with applicable government standards relative to manufacture, construction, design, formulation, warnings, instructions, or representations when the product left the control of that party.[118]

Raising compliance with governmental standards to the level of a complete defense to a punitive damages claim is consistent with prior law regarding product liability claims predicated on a negligence theory. In *Temple v. Wean United, Inc.*,[119] the court ruled that compliance with a state safety standard governing power press guards was a complete defense, as a matter of law, to the negligence based claim presented.[120] As punitive damages are available only upon a showing of the requisite intent (whether under decisional law or by statute), the statute is well supported by *Temple*. Intent, no

115. Sub. H.B. 350 § 2307.801(E).

116. Ohio Rev. Code § 2307.80 had mandated that after a finding of punitive damages liability the amount of damages be established by the court. OHIO REV. CODE ANN. § 2307.80(B). A virtually identical provision found in Ohio Rev. Code § 2315.21 violated the right to trial by jury. *Id.* § 2315.21(C)(2). *See* Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401 (Ohio 1994) (declaring § 2307.80(B) unconstitutional for impinging on jury's traditional function of setting damages). The new statute expressly requires the jury to determine the amount of punitive damages thereby resolving the right to trial by jury issue raised in *Zoppo*. Other sections of this statute, including the standard for imposition of liability, though somewhat different from earlier case law are consistent with that law. *See, e.g.*, Miles v. Kohli & Kaliher Assocs., 917 F.2d 235, 252 (6th Cir. 1990) (requiring evidence of deliberate or intentional misconduct greater than mere negligence before imposing punitive damages); Calmes v. Goodyear Tire & Rubber Co., 575 N.E.2d 416, 419 (Ohio 1991) (restricting punitive damages to situations where party has acted with ill will or intent or has shown conscious disregard for safety of others).

117. Sub. H.B. 350 §§ 2307.801(C)(1), (C)(10)(b). These provisions are consistent with the justification for the initial treatment of ethical drugs and raise no constitutional issue. Nor do these provisions conflict with federal law as to raise an issue of preemption. *See* Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2251-53 (1996) (rejecting preemption defense to permit Florida law to apply to claims against manufacturer of allegedly defective pacemaker).

118. Sub. H.B. 350 § 2307.801(D).

119. 364 N.E.2d 267 (Ohio 1977).

120. *Id.* at 273. This defense is not applicable to actions predicated on strict liability. In strict liability actions such evidence is relevant only to the more limited question of the reasonableness of the manufacturer's conscious design choice. Knitz v. Minster Mach. Co., 432 N.E.2d 814, 817 (Ohio), *cert. denied*, 459 U.S. 857 (1982).

matter how defined, relates to conduct and some level of negligence as distinct from the non-conduct based principles of strict liability in tort.[121]

If these and related provisions of Ohio tort reform legislation are valid, a significant step toward restoring balance to the civil justice system will be achieved. The Ohio Constitution should be applied in a manner conducive to such a result. The reforms described in this section do not impinge upon the right to trial by jury, permit all injured claimants access to the courts,[122] and are consistent with a reasonably objective application of due process and equal protection mandates. In these areas the Ohio General Assembly has crafted legislation which reflects valid perceptions of public need and the Ohio Constitution.

B. Proposed Provisions Which, Though Raising Serious Constitutional Dimensions, Should Be Upheld But . . .

1. Repose—Wrongful Death

Certain to be attacked is the adoption of a fifteen-year statute of repose for wrongful death actions.[123] This repose statute is unlike any other in the legislation as it relates to a statutory cause of action. For this reason the requirement that wrongful death actions be commenced within two years of date of death, without regard to knowledge or the utilization of a discovery rule, is valid.[124] This result, based on the principle that the legislature has the power to condition the right it created as it deems appropriate, applies with equal force to the repose provision. The fifteen year period utilizes the same conditioning language of "shall be commenced" as is found in the two-year provision. In addition, the General Assembly provides a substantial number of reasons in support of this limitation including paragraphs addressing specific constitutional concerns.[125] Other claims which support this provision

121. Even in Leichtamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981), where the court upheld an award of punitive damages in a strict liability crashworthiness action, the imposition of punitive damages was predicated on improper conduct. *Id.* at 578-80.

122. Provisions regarding commencement of claims pursuant to the Wrongful Death Act present an exception to this conclusion. OHIO REV. CODE ANN. § 2125.01.

123. Amend. Sub. H.B. 350 § 2125.02(D)(2)(a) provides that no action for wrongful death involving a product liability claim shall be commenced against its manufacturer or supplier more than 15 years from the date the product was delivered to its first consumer purchaser or lessee. Additional subparts set forth a number of exceptions based on fraud, express representations, extending the limit to a full two years when death occurs within the 15 year period, and incorporate a discovery rule. These exceptions will limit the number of claims which will be affected by the repose period and resolve many of the concerns regarding statutes of repose. See *infra* Part III.C.2 for further discussion of repose issues.

124. Shover v. Cordis Corp., 574 N.E.2d 457, 459 (Ohio 1991). *See also* Keaton v. Ribbeck, 391 N.E.2d 307, 309 (Ohio 1979) (upholding limitations upon recovery as specified in Ohio Rev. Code § 2125.02).

125. Amend. Sub. H.B. 350 § 5(L)(1)-(10). Subparagraph (10) asserts that the statute strikes "a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers . . . ."

apply with equal force to all product liability claims.[126] This approach demands that this limited repose provision survive constitutional scrutiny.

Nevertheless, when a wrongful death claimant is barred by application of the repose period, the court may devise a means to overcome the bar. Assuming that it is not possible to bring the facts within the purview of one of the statutory exceptions, the court will rely upon the Ohio Constitution. The repose provision bars a claim before it is even recognized as such by the statutory claimants.[127] This fact may encourage the court to find a violation of the open courts provision even if this means distinguishing or overruling an entire line of well-reasoned precedent. This result would be consistent with its approach to other repose statutes[128] and with a judicial philosophy grounded upon a need to compensate tort victims.

2. Release/Judgment—Wrongful Death

Equally certain of attack is a second major amendment to the Wrongful Death Act which will preclude the bringing of such a claim based upon prior compensation for personal injury. The section precludes a death action if, prior to death, the decedent was compensated for personal injuries arising out of the same circumstances which led to death where the compensation was made by the person (or that person's administrator or executor) liable for causing the harm and the eventual decedent either (1) executed a release, or (2) obtained a satisfaction of judgment arising from a civil suit.[129] This amendment recognizes, and deals with, the legal fact that the decedent's personal injury claim or survival action is distinct from the wrongful death action claim.[130]

This amendment would foreclose the possibility of a wrongful death action once a personal injury action predicated on the same events has been fully resolved.[131] In many situations, especially those relating to toxic torts or other harms that have immediate effects plus potential long range effects, a defendant who pays for the immediate effects—a payment often including compensation to a spouse or other family member as well as the physically

126. *Id.* § 5(L)(2)-(9). Key factors in these paragraphs address control over the product, evidentiary concerns, and enhancement of competitiveness.

127. OHIO CONST. art. I, § 16.

128. Discussed *infra* Part III.C.2.

129. Sub. H.B. 350 § 2305.01(B)(1), (2).

130. The common law personal injury action is for the benefit of the injured party whereas the statutory wrongful death action is for the benefit of statutory beneficiaries. *See, e.g.*, Shover v. Cordis Corp., 574 N.E.2d 457, 459 (Ohio 1991) (statute of limitations); Mahoning Valley Ry. Co. v. Van Alstine, 83 N.E. 601, 605 (Ohio 1908) (prior judgment is not estoppel).

131. Ohio courts do not appear to have addressed the issue in terms of either the conditioning language of Ohio Rev. Code § 2125.01 (allowing suit only if injured party had right to recover damages had death not intervened), or the effect of early negligence-based decisions, such as Phillips v. Community Traction Co., 189 N.E. 444, 444 (Ohio Ct. App. 1933) (releases were not a bar due to independent nature of subsequent action). A dissenting opinion in Prem v. Cox, 443 N.E.2d 511, 515 (Ohio 1983) (Krupansky, J., dissenting), suggests that the conditioning language would bar a subsequent action.

injured party—will have to pay again after the injured party's death. A classic example is payment to resolve an asbestosis claim followed by a wrongful death action predicated on mesothelioma even though all concerned were well aware that asbestosis victims may well become mesothelioma victims.[132] Other scenarios are also possible.[133]

The problems with this amendment are obvious. For example, there is a logical inconsistency in allowing resolution of one action to foreclose a completely different action and the eventual decedent is given the power to sign away rights of independent parties who may receive no consideration.[134] Existing treatment of wrongful death claims and recognized contract principles are arguably jeopardized.[135]

On the other hand, giving full effect to the release will promote a number of important policy concerns. Such a result will aid settlement efforts; provide protection against future claims rather than denying repose to alleged tortfeasors; avoid the practical problem of identifying potential beneficiaries in advance of death; and encourage payment to those who have been wrongfully injured.[136] It is also possible that this approach will mitigate

---

132. *See, e.g.*, Pecorino v. Raymark Indus., Inc., 763 S.W.2d 561, 574 (Tex. Ct. App. 1988) (spouse of mesothelioma decedent could not maintain wrongful death action following prior settlement and release).

133. For example, in a matter defended by the author, an employee of a company manufacturing plastic pipe sued her employer and others on the ground that she suffered respiratory illness due to exposure to polyvinylchloride monomer. Years after a nominal settlement, and her execution of a release, she died of cirrhosis of the liver. The former employee's daughter filed a wrongful death action against the same defendants asserting that the cirrhosis was caused by the same exposure. After discovery established that plaintiff could not substantiate the claim, a Rule 41 Dismissal was filed. Glick v. The Hoechst Celanese Chem. Group, No. 932CVC03-1757 (Ohio C.P. Franklin County July 6, 1993). In this case, and many similar cases, the proposed statute would yield the same result with greater cost efficiency. Just such a cost-efficient result was achieved in regard to the survival action which was "dismissed with prejudice based on a release" on February 4, 1993.

134. Such issues have been addressed. *See, e.g.*, Hall v. Knudsen, 535 A.2d 772, 775 (R.I. 1988) (release made it impossible to meet conditioning language similar to that of Ohio's provision and this result was consistent with public policy supporting settlement of disputes); *Pecorino*, 763 S.W.2d at 574 (barring death claim where personal injury action release had been executed by decedent's widow as well as by decedent).

135. A release will usually bear upon claims existing or which may arise out of a given set of circumstances whether or not known at the time of execution. In many such cases, especially those involving toxic torts, the victim will be aware of potentially grave danger. The broad language and protection granted in releases are uniformly upheld against the compensated signatories (absent fraud or overreaching) as this is a necessary tool to gain finality and thereby encourage settlement. *See, e.g.*, Whitt v. Hutchison, 330 N.E.2d 678, 683 (Ohio 1975) (finding release that is clear in its terms raises presumption that injury is fully compensated). *But see* Fannin v. Norfolk & Western Ry. Co., 666 N.E.2d 291, 295 (Ohio Ct. App. 1995) (broad language of release did not waive FELA *rights* with respect to claims which had not yet risen). Resolution of the complex contract law question of whether a broadly framed release can bar the claims of third parties is beyond the scope of this Article. The proposed legislation provides one logical response.

136. These concerns have been recognized and discussed in a number of decisions outside of Ohio. *See Hall*, 535 A.2d at 775 (endorsing settlement of disputes); Haws v. Luethje, 503 P.2d

against delays in the resolution of personal injury claims where the nature of the claim is such that death might be a future concern.[137] The section implicitly recognizes that resolution of the original personal injury claim could also provide a direct or indirect benefit to one or more of the statutory beneficiaries.[138]

This approach, were it not directed to wrongful death actions, could fall to various constitutional attacks most particularly the open courts provision and the due process clause.[139] As there is a relationship between legislative objectives and this amendment, which bears upon the general welfare, it is possible to uphold the provision as consistent with due process unless deemed arbitrary or unreasonable. Defending this bar against a violation of the open courts provision would be more difficult, but is possible.[140] However, if viewed as merely another means to condition the right to bring a wrongful death action, the amendment must be upheld. As this is a conditioning event, conceptually similar to that which conditions the right to bring the action within two years of death, and serves salutary purposes, the section should be upheld.

3. Hazardous Substance and Toxic Tort Actions

In an open effort to overrule the Supreme Court of Ohio, the General Assembly crafted Ohio Revised Code section 2307.792 to impose a more defense-oriented standard for the granting of summary judgment in hazardous or toxic tort exposure actions.[141] This section mandates that in such actions the plaintiff must establish that the conduct of a particular defendant was a

871, 876 (Okla. 1972) (alternatives discourage settlement and frustrate compensation); Schoenrock v. CIGNA Health Plan of Ariz., Inc., 715 P.2d 1236, 1238 (Ariz. Ct. App. 1985) (supporting proposition that otherwise tortfeasor would be faced with potentially endless litigation); Suber v. Ohio Medical Prods., Inc., 811 S.W.2d 646, 650 (Tex. Ct. App. 1991) (upholding legislative intent to limit remedy available under wrongful death statute).

137. Many delay tactics to the resolution of a personal injury action are possible within the bounds of professional ethics. In an effort to outwait death, and thus avoid the potential for multiple suits, unethical practices might also be encouraged.

138. These gains may or may not comprise a double recovery. Regardless, if present they provide a degree of compensation which mitigates what could otherwise be a harsh rule.

139. As the classification is reasonable, an equal protection analysis should yield the same result as a due process analysis.

140. The United States Supreme Court has recognized that a state "remains free to . . . eliminate its statutorily created causes of action altogether." Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982). If there is no vested constitutional right in a common law action, as was held in Strock v. Pressnell, 527 N.E.2d 1235, 1241 (Ohio 1988), it is logical to find no such right in a statutory action. The flaw in this logic is, of course, that once the right is recognized it cannot be arbitrarily denied.

141. Amend. Sub. H.B. 350 § 5(O) states that the legislative intent is to establish the standard for summary judgment in such cases in a manner consistent with Lohrman v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986), and contrary to the law announced in Syllabus 2 of Horton v. Harwick Chem. Corp, 653 N.E.2d 1196 (Ohio 1995). The *Lohrman* court found that there must be evidence of exposure to a product for some period of time. *Lohrman*, 782 F.2d at 1162-63. The *Horton* court, on the other hand, found that the plaintiff need not establish specific exposure to a product on a regular basis over time. *Horton*, 653 N.E.2d at 1197.

substantial factor in bringing about the harm for which recovery is sought.[142] The section then defines what the jury shall consider in its determination of whether a given exposure was a substantial factor.[143]

Like the provisions found in existing Ohio Revised Code section 2307.80, where a non-exclusive list of factors to be considered by the jury in reaching its decision as to the amount of punitive damages imposed is provided, the factors in section 2307.792 shall be considered "without limitation."[144] There is, in both statutes, a minimal invasion of the jury prerogative as the jury is ordered to consider specified facts in reaching its decision. This is no different than many other jury instructions which mandate consideration of certain facts yet allow the jury freedom to give those facts appropriate weight and the discretion necessary to deal with the totality of the factual evidence. This retained jury power should suffice to overcome any assertion that there is an improper impingement on the right to trial by jury. As hazardous and toxic substance litigation is unique,[145] the legislative classification is consistent with mandates of equal protection. There do not appear to be valid due process concerns and certainly the open courts mandate is met.

The court could, however, overturn this section by viewing it as a blatant effort to reject judicial wisdom. The court's rejection of *Lohrman v. Pittsburgh Corning Corp.*,[146] and adoption of a more modern approach to defining "substantial factor" in *Horton v. Harwick Chemical Corp.*,[147] was fully and well-reasoned.[148] A likely mode of constitutional attack will be predicated on a model similar to the motto "Don't Tread on Me." Even if the court were to find that traditional avenues of constitutional review fall short of voiding this section, it may refuse to ignore the conflict between the judicial and legislative branches raised more by the legislative intent than the section itself.

An analogous conflict was reviewed in *Rockey v. 84 Lumber Co.*[149] In *Rockey*, the court considered the validity of a statute which barred a tort

142. Amend. Sub. H.B. 350 § 2307.792.

143. *Id.* § 2307.792(A)-(D). The facts, specified in subparagraphs (A)-(D), are the manner of exposure, the proximity of the substance to the plaintiff at time of exposure, the frequency and length of exposure, and factors that mitigated or enhanced exposure.

144. *Id.* § 2307.792.

145. If for no other reasons than that (1) the onset of disease from such exposure is often delayed for years following exposure (latency periods), and (2) in many situations it is difficult to gain the information necessary to establish cause and effect for many years. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 582 (1993) (bendectin); Borel v. Fibreboard Paper Prods. Co., 493 F.2d 1076, 1081 (5th Cir. 1973) (asbestos), *cert. denied*, 419 U.S. 869 (1974). An argument can be made that these cases are no more unique than other product liability claims such as those surrounding second collision cases which often present extremely complex proof issues. The courts, by adopting a special standard of proof for toxic tort cases, have indicated that these cases are unique.

146. 782 F.2d 1156 (4th Cir. 1986).

147. 653 N.E.2d 1196 (Ohio 1995).

148. *Id.* at 1200-02 (rejecting *Lohrman* test as being medical or scientific standard and adopting substantial factor test as more clear and applicable legal standard).

149. 611 N.E.2d 789 (Ohio 1993).

action plaintiff from specifying the amount of damages sought if such damages exceeded a specified sum.[150] This provision was in direct conflict with the Ohio Rules of Civil Procedure which required that a complaint include the actual amount of damages sought.[151] The court invalidated the statute because the Civil Rules are the law of the state with regard to judicial practice and procedure and they take precedence over statutes when promulgated by the Supreme Court in accord with the Ohio Constitution.[152]

The question will become whether this section, which defines a core element of proof for the bringing of a toxic tort claim, is a substantive rule of law or a rule of practice and procedure. The statutory language is substantive and the legislative intent ambiguous as it seeks to address the "standard" for granting summary judgment. As any change in substantive or procedural law can bear upon the outcome of a motion for summary judgment, one can argue that this is a substantive rule effectuated through a procedural device. As such it does not differ from other legislation seeking to define and limit a cause of action.[153] Despite the fact that the standard for summary judgment is the recognized target of this provision, the means of adjusting that standard are substantive.[154] Standards for summary judgment are set forth in Rule 56 of the Ohio Rules of Civil Procedure.[155] This "standard" does not conflict with Rule 56.

In comparison to this modification of the proof necessary to meet a legal standard, the *Rockey* decision focused on a statute which was in direct conflict with an enacted rule of procedure.[156] To void the hazardous substance and toxic tort provision the court will have to create a parallel which does not exist. Such an approach is not beyond the pale. The problem with maintaining the integrity of this section is that the legislative intent can be construed

150. OHIO REV. CODE ANN. § 2309.01(B)(2).

151. OHIO R. CIV. P. 8(A).

152. *Rockey*, 611 N.E.2d at 791-92. The Ohio Constitution provides in pertinent part that "the Supreme Court shall prescribe rules governing practice and procedure in all courts of the state . . . [and procedures for adopting rules]. . . . All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect." OHIO CONST. art. IV, § 5(B).

153. A ready analogue is seen in the legislative development of intentional tort doctrine discussed *supra* notes 16-25 and in the accompanying text.

154. That there is no intent to impinge upon the court's power to promulgate rules of practice and procedure is evidenced by the JCC's deletion of subparagraph (B) from the section's original version. Proposed § 2307.792(B) had mandated the entry of summary judgment if a plaintiff failed to offer proof that the exposure was a substantial factor in causing the alleged harm. It is also possible that the committee simply recognized that this mandate was meaningless as it instructed the courts to do no more than what they already do when a party is incapable of submitting evidence sufficient to overcome a well-pleaded motion. *See* Wing v. Anchor Media, Ltd., 570 N.E.2d 1095, 1099 (Ohio 1991) (summary judgment motion compels nonmoving party to produce evidence to oppose motion).

155. A rule interpreted and applied in a manner consistent with its federal counterpart. *See Wing*, 570 N.E.2d at 1099. Nothing in § 2307.792 conflicts with the standards established in *Wing* or subsequent decisions such as Fiorella v. Ashland Oil, Inc., 635 N.E.2d 1306, 1307 (Ohio Ct. App. 1993) (plaintiff compelled to produce evidence to establish issue of material fact in order to avoid summary judgment).

156. *Rockey*, 611 N.E.2d at 792.

as a procedural rule to justify a *Rockey* conclusion. Although Rule 56 does not address the substantive law standard for summary judgment, and the Rule is not truly implicated, the court can create the procedural conflict necessary to void this provision.

4. Collateral Benefits

A revision of Ohio Revised Code section 2317.45 once again seeks to abrogate a substantial portion of the collateral source rule. This rule, which mandates that no evidence relating to an injured party's receipt of payments from collateral sources, such as insurance or workers' compensation, can be presented to the jury, has been part of Ohio jurisprudence for over thirty years.[157] The most significant change in the law is that the jury will now be permitted to consider collateral source evidence.[158] This constitutes an overruling of existing law for, as noted in *Buchman v. Board of Education*,[159] under the law of *Pryor v. Webber*,[160] "receipt of [collateral] benefits is not to be admitted in evidence, or otherwise disclosed to the jury."[161]

The initial effort to abrogate the rule legislatively failed with the decision in *Sorrell*.[162] The proposed legislation is specifically intended to abrogate the common law collateral source rule of *Pryor* and *Sorrell*, and to address the constitutional concerns posited by the courts.[163] Although there is no mention of the policy reasons which prompted the legislature to create this section, the Ohio Supreme Court has previously addressed the primary rationales.[164] Indeed, the court has recognized that "the goal of preventing double recoveries is not arbitrary or unreasonable."[165] The new approach to

157. The rule was firmly adopted as consistent with legal theory and public policy no later than Pryor v. Webber, 263 N.E.2d 235, 238 (Ohio 1970).

158. Sub. H.B. 350 § 2317.45.

159. 652 N.E.2d 952 (Ohio 1995).

160. 263 N.E.2d 235, 239 (Ohio 1970).

161. *Buchman*, 652 N.E.2d at 961 (quoting Pryor v. Webber, 263 N.E.2d 235, 239 (Ohio 1970)).

162. 633 N.E.2d 504 (Ohio 1994). See *supra* notes 46-62 and accompanying text for a discussion of *Sorrell*.

163. Amend. Sub. H.B. 350 § 5(I). The opinions noted by the General Assembly include *Sorrell*, cases decided on the basis of that decision, and Samuels v. Coil Bar Corp., 61 Ohio Misc. 2d 407 (Ohio C.P. 1991), in which the court held that Ohio Rev. Code § 2315.45, when applied to a wrongful death action, improperly limited the amount of damages and was therefore in violation of Article I, § 19a of the Ohio Constitution. This section provides, in applicable part, that: "The amount of damages recoverable in the courts for death . . . shall not be limited by law." The *Samuels* court relied on Kennedy v. Byers, 140 N.E. 630 (Ohio 1923), to conclude that the legislature could determine the types of recoverable damages, but not the amount of such damages. *Samuels*, 61 Ohio Misc. 2d at 410.

164. The court rejected a largely unsubstantiated claim that statutory abrogation of the rule was necessary to overcome an insurance crisis. *Sorrell*, 633 N.E.2d at 511. The court's rejection of a valid policy reason, the prevention of double recovery, was far less sweeping and focused not on the validity of the purpose, but upon the means to achieve it. *Id.*

165. *Id.* (relying on Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991)).

abrogation is directed toward prevention of double recovery and should meet constitutional muster.

A primary factor in constitutional rejection of the prior section 2317.45 was that it violated the fundamental right to trial by jury.[166] The mandate that the court, rather than the jury, would hear the evidence regarding collateral sources and adjust the judgment accordingly was offensive to the right of trial by jury. This patent constitutional violation has been cured in the new statute which provides that in making the determination of compensatory damages the trier of fact shall consider relevant collateral benefits.[167] Compliance with the right to trial by jury also simplifies the task of supporting the statute against other constitutional claims as it is now more conducive to a lower level of scrutiny than the strict scrutiny standard applied in *Sorrell*.

The proposed statute is also designed to overcome the due process concerns upon which the predecessor statute floundered. In regard to the legislative purpose, two factors stand out. First, there is no suggestion that this statute will have an effect on insurance rates. Second, the purpose of the statute is clearly the prevention of double recovery. Despite its recognition that prevention of double recovery was a legitimate state interest, the court voided the prior statute as it failed to provide a means by which anyone could determine whether a collateral benefit was included in the verdict. The proposed statute makes clear that the evidence will be heard and evaluated by the trier of fact and that such evidence is limited to relevant collateral sources.[168]

As there is now no deduction for collateral source payments, there is no need for ascertaining whether such payments have been included in the jury verdict. This statute authorizes the jury to consider the effect of collateral source payments, however it believes appropriate, in its determination of compensatory damages. The statute's modifications have removed the arbitrary and unreasonable aspects of the prior statute. In other words, the statute merely permits the jury to predicate its award on the full story.

Even if the end result is that the jury returns a no payment verdict, no due process concern exists. This is because the jury has determined that the injured party has been fully compensated for both economic and noneconomic loss. That the collateral source payments did not include noneconomic loss is irrelevant. The decision is that of the jury not that of the court through modification of the jury award.

In a similar manner, the proposed statute negates the prior basis for finding an equal protection violation. The *Sorrell* court was unable to recon-

166. *See id.* at 511-12, 515 (section 2317.45 requires deductions of damages awarded by juries and undermines constitutional right to trial by jury).

167. Sub. H.B. 350 § 2317.45(B). Section 2317.45(A)(3) identifies the "trier of fact" as the jury or, in a nonjury action, the court.

168. The broad definition of collateral source contained in proposed § 2317.45(A)(2) is limited in that the jury can consider only evidence that is presented concerning collateral source payments that have not been paid for by the plaintiff (or plaintiff's spouse or parent if a minor) and which are not subject to subrogation or other recoupment claims. *Id.* § 2317.45(B).

cile the provisions of Ohio Revised Code section 2305.27 with those of section 2317.45. Section 2305.27, which is not amended by H.B. 350, addresses collateral sources in medical malpractice actions and does not require setoffs for payments made by various government sources such as workers' compensation and social security, and has other provisions which differ from those applicable to the torts governed by section 2317.45.[169] The revised section does not require setoffs. Juries are free to ignore the collateral benefits that are excluded from jury consideration in the medical malpractice statute. This should suffice to overcome an equal protection challenge as any setoff is discretionary. Nevertheless, a difference remains which creates a potential for voiding at least one of the two statutes.

If there is an equal protection problem, it is easily resolved. The *Sorrell* court correctly observed that the validity of section 2305.27 had become "questionable at best."[170] It is possible, and somewhat logical, to deem section 2325.27 technically inconsistent with section 2317.45. It is illogical to void both sections on this analysis as the voiding of section 2305.27 would obviate the entire equal protection issue.[171] Such a ruling would permit the provisions of section 2317.45 to apply to medical malpractice actions because its scope is defined to include civil actions for injury or loss to person or property.[172]

There remains but one additional challenge to the constitutional validity of the proposed modification of the collateral source rule. This challenge will be based on the fact that it is, at least theoretically, possible for a jury to determine that a plaintiff was wronged and has been fully compensated through collateral sources. In *Sorrell* the court found that deduction of collateral source payments could reduce a plaintiff's verdict to zero.[173] This result would deprive plaintiffs of a "meaningful" remedy as required by the open courts mandate. Two differences between the proposed and prior statutes are immediately apparent: (1) the prior statute called for a judgment and then reduced it; and (2) that approach made the potential for a zero bottom line real rather than largely theoretical as in the proposed section.

If, upon hearing all of the evidence including the extent of prior compensation, a jury determines that no further payment is appropriate, that is a valid jury finding. There is no reduction of the jury verdict because the "no award" is the jury's decision, not an arbitrary result of a law of which the jury

169. For details, see *Sorrell*, 633 N.E.2d at 512-13.

170. *Id.* at 512. The court literally questioned the viability of Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991), which had upheld the constitutionality of § 2305.27. *Sorrell*, 633 N.E.2d at 512.

171. Voiding § 2317.45 would not resolve the equal protection question as two classes would still remain: medical malpractice victims and all other tort victims.

172. Sub. H.B. 350 § 2317.45(A)(2). Although injury is not defined, the term is applied in regard to "tort actions." A medical malpractice action is a tort action. This section on the scope of application deletes the former inclusion of death actions and therefore meets any challenge predicated on the approach of Samuels v. Coil Bar Corp., 61 Ohio Misc. 2d 407 (Ohio C.P. 1991). In *Samuels*, the court held that § 2317.45 was unconstitutional because it improperly limited the amount of damages recoverable in wrongful death actions. *Id.* at 410.

173. *Sorrell*, 633 N.E.2d at 511.

was ignorant. Moreover, it is difficult to envision a case of serious injury in which collateral source deductions will nullify all possible additional compensation.

On a more practical level, the proposed statute cannot deprive a plaintiff of a meaningful remedy as it does not mandate that the jury reduce its award based on plaintiff's receipt of collateral benefits. It demands only that the trier of fact consider such evidence in reaching its judgment as to the proper amount of compensatory damages. In this way the rights of all parties, including those of defendants, are recognized.[174]

The abrogation of the collateral source rule in this statute is less severe than that upheld in the now questionable *Morris* decision[175] and is consistent with the abrogation of the rule in regard to claims against political subdivisions. Although the special nature of political subdivisions distinguishes the statute upheld in *Buchman*,[176] the underlying purpose remains the prevention of double recovery. The statute allows for every plaintiff to gain a full hearing before the jury and to receive an award which that jury deems appropriate. By any reasonable standard, this statute allows for a "meaningful" remedy. It should be upheld.

C. *Proposed Provisions Which Face an Early Demise Due to Constitutional Infirmities*

With the exception of the issues posed by the merger of joint and several liability with comparative negligence, it is apparent that the Ohio General Assembly has determined to do battle with the Ohio Supreme Court in its approach to aspects of the pending Tort Reform Act. The General Assembly's awareness of the constitutional issues is illustrated by the various statements of intent made in support of the proposed repose and damage limitation statutes. These efforts are, of course, futile. Judicial review of each statute will be made with little, if any, regard for the constitutional analysis of the legislative branch. Nevertheless, the position taken by the General Assembly is revealing.

In its discussion of the malpractice repose provision contained in proposed Ohio Revised Code section 2305.11, the General Assembly relies on *Sedar*[177] to assert that "the concept of a statute of repose does not violate the remedy by due course of law and open courts provisions . . . of the Ohio Constitution, the equal protection guarantee . . . of the Ohio Constitution, . . .

174. Just as a plaintiff is entitled to fair compensation, a culpable defendant is entitled to a judgment which reflects an award that makes plaintiff whole without regard to its source. *See id.* at 514 (Moyer, C.J., dissenting).

175. 576 N.E.2d 765, 772 (Ohio 1991) (upholding constitutionality of Ohio Rev. Code § 2305.27 compelling reduction in damages by amount of any collateral benefits derived from medical malpractice action).

176. 652 N.E.2d 952, 957 (Ohio 1995) (upholding collateral source limitations of Ohio Rev. Code § 2744.05(B) as applying to Social Security and Medicaid benefits).

177. 551 N.E.2d 938 (Ohio 1990).

or the United States Constitution."[178] Moreover, failure to enact a repose provision "would violate the rights of certain defendants to due course of law."[179] Complementary arguments are made in support of the product liability repose statute contained in proposed amendments to Ohio Revised Code section 2305.10.[180]

A rather startling assertion is made in support of the effort to limit the amount of punitive damages by the amendment to 2307.801[181] of the Ohio Revised Code. After an accurate statement that excessive and occasional multiple awards of punitive damages exist,[182] the General Assembly contends that this violates the prohibition against cruel and unusual punishment and the due process clauses of both the Ohio and United States Constitutions.[183] There is a substantial body of literature addressing the extent to which constitutional law bears upon damage limitations.[184]

---

178. Amend. Sub. H.B. 350 § 5(G)(1). The section fails to mention that *Sedar* was overruled by Brennaman v. R.M.I. Co., 639 N.E.2d 425, 430 (Ohio 1994).

179. Amend. Sub. H.B. 350 § 5(G)(4). No further definition of "certain defendants" is provided nor is any authority cited for this potentially important argument.

180. Again, no mention is made of the fact that *Sedar* was overruled by *Brennaman*, but here the discussion indicates that the General Assembly "respectfully" disagrees with *Brennaman*. *Id.* § 5(L)(1).

181. Originally numbered 2307.80.

182. *But see* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 36, 45, 49-50 (1992) (arguing that based on various studies of product liability cases punitive damages have been decreasing and are generally in modest amounts).

183. Amend. Sub. H.B. 350 § 5(B)(1)(b). It does not appear that any Ohio decision supports this contention. The United States Supreme Court has recognized that there are due process implications when excessive punitive damages are awarded. *See, e.g.*, BMW of North Am., Inc. v. Gore, 116 S. Ct. 1589, 1595 (1996) (due process is violated when punitive damages are grossly excessive in relation to state's interest in determining level of allowable punitive damages); TXO Prod. Corp. v. Alliance Resources, Corp., 509 U.S. 443, 460 (1993) (punitive damages 10 times greater than amount of actual damages was not grossly excessive considering potential harm of defendant's conduct). No level of punitive damages implicates the United States Constitution's prohibition against excessive fines. *See* Browning Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 266-68 (1989) (punitive damages are not subject to Excessive Fines Clause of Eighth Amendment because there is no restriction on award of money damages in civil suit where government has no right to recover damages awarded). In light of the long history of punitive damages awards, it is rather difficult to appreciate a claim that their imposition violates the Cruel and Unusual Punishment Clause.

184. *See, e.g.*, Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 979-80, 982, 988, 1007-08 (1989) (arguing that due process requires change in procedure which would make punitive damages more predictable in order to advance deterrence objective); Bruce J. Ennis, *Punitive Damages and the U.S. Constitution*, 25 TORT & INS. L.J. 587, 588, 591-98 (1990) (analyzing history of constitutional arguments against imposing punitive damages and potential court actions); Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 AM. U. L. REV. 1365, 1374-75, 1380-82 (1993) (arguing that state legislatures should take several measures to reform punitive damages laws). *See generally* Daniel J. Jacobs, *Punitive Damages in Product Liability Cases: A Selective Bibliography*, 50 REC. ASS'N B. CITY OF N.Y. 360 (1995) (listing selection of articles and reports discussing punitive damages in product liability cases); Aaron D. Twerski, *Punitive Damage Awards in Product Lia-*

In addition to a series of factual and policy reasons supporting a limitation on the amount of noneconomic damages that can be awarded, an effort is made to prove that this legislation is consistent with the legislature's power to limit the jurisdiction of the courts of common pleas pursuant to Ohio Constitution, Article IV, Section 4(B).[185] In this way the General Assembly seeks to turn the separation of powers doctrine to its advantage. Though the court has the power of judicial review, the legislature may have the power to determine the nature of matters which the courts can consider. If the courts accept this line of reasoning, which is highly unlikely, the provision would have to be upheld.

Finally, the General Assembly interprets and relies upon Article I, Section 19a of the Ohio Constitution to argue that its mandate, which by its terms is limited to death actions,[186] is (1) limited to economic and pecuniary loss, and (2) supports legislative authority to limit damages "otherwise."[187] The basis for the first part of this analysis is not clear. The second part, at least for personal injury claims, is arguably supported by the statutory interpretation principle of *expressio unius*.[188]

Although several of the arguments posited by the General Assembly have merit, they will not prevail. This is a battle that the General Assembly cannot win.

1. The Overlooked Issue Posed by the Merger of Joint and Several Liability with Comparative Negligence

Existing statutory law provides for the application of comparative negligence[189] and, though in limited circumstances, retains joint and several liability.[190] The proposed legislation continues this approach and extends its

---

bility Litigation: Strong Medicine or Poison Pill?, 39 VILL. L. REV. 353 (1993) (presenting overview of punitive damages and their role in design defect product liability cases).

185. Amend. Sub. H.B. 350, § 5(P)(7). This claim is buttressed by reference to Article IV, § 18 of the Ohio Constitution relating to the powers of the judges. As these sections of the constitution are not self-executing, the General Assembly claims that this legislation only limits the jurisdiction of the trial courts and the power of judges in a manner consistent with legislative authority.

186. The text of the provision does not seem to support such a claim. See *supra* note 163, for an argument that that under the Ohio Constitution the amount of damages recoverable in wrongful death actions cannot be limited by law.

187. Amend. Sub. H.B. 350 § 5(P)(6).

188. *Expressio unius est exclusio alterius* is a "maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

189. OHIO REV. CODE ANN. § 2315.19. Though comparative fault is a more accurate description of the doctrine, the term comparative negligence is used as that is the nomenclature of the statutes involved.

190. Joint and several liability is retained for that portion of compensatory damages which represents economic loss for any defendant whose tortious conduct was more than 50% responsible for the harm involved. *Id.* §§ 2315.19(C), 2315.19(D)(1)(c). *See also id.* § 2307.31(B) (tortfeasor that enters into settlement with claimant cannot recover contribution from another

application to product liability actions.[191] Comparative negligence has long been upheld by the court.[192] Its extension to product liability cases is consistent with a national trend and should present no constitutional issue.[193] Joint and several liability principles have long been a part of Ohio and national jurisprudence.

Both doctrines serve valid objectives. Their merger, however, presents a serious constitutional issue which mandates the abolition of joint and several liability. There is no recognition of this potential in any reported Ohio decision.[194] Decisions which have permitted joint and several liability to increase the payment made by a defendant, without regard to the jury finding of that defendant's actual contribution to the harm, have generally focused on the need to protect victims and left the rights of contribution to be fought among the defendants.[195] Many courts have determined that these doctrines are compatible and have upheld increased financial liability.[196] Their decisions

---

tortfeasor whose liability is not terminated by the settlement). A similar approach was seen in § 110 of the Federal Act, *supra* note 102.

191. Amend. Sub. H.B. 350 §§ 2307.31(B)(1)-(3), 2315.20(C).

192. *See* Wilfong v. Batdorf, 451 N.E.2d 1185, 1189 (Ohio 1983) (section 2315.19 of the Ohio Revised Code, which called for application of comparative negligence, superseded common law which barred recovery because of contributory negligence).

193. There should be no such issue even though the proposed legislation merges the defenses of contributory negligence and express and implied assumption of the risk for responsibility allocation in tort actions other than those sounding in product liability, Ohio Rev. Code § 2315.19, but retains the distinction and maintains express or implied assumption of the risk as a complete defense to product liability claims. Amend. Sub. H.B. 359 § 2315.20(B)(1). This distinction is consistent with decisional law. *See* Onderko v. Richmond Mfg. Co., 511 N.E.2d 388, 391-92 (Ohio 1987) (assumption of risk is complete bar to product liability action based on strict liability). The General Assembly fails to provide any indication as to why this inappropriate distinction is retained. The proposed statute, consistent with the law of many other states, would also make clear that the conduct of all parties who contributed to the alleged harm, regardless of whether they are before the court, would be admissible into evidence for consideration in the determination of relative fault. Amend. Sub. H.B. 350 § 2307.31(C). This modification represents a long overdue change.

194. This is somewhat surprising as Ohio Rev. Code § 2315.19 took effect in January 1988, together with the entire Product Liability Act and other tort reform legislation much of which has been subjected to challenge.

195. *See, e.g.*, Bowling v. Heil Co., 511 N.E.2d 373, 381 (Ohio 1987) (sections 2307.31 and 2307.32 of Ohio Revised Code affect only relationship between joint tortfeasors and not relationship between joint tortfeasors and plaintiff).

196. *See, e.g.*, Coats v. Penrod Drilling Corp., 5 F.3d 877, 889 (5th Cir. 1993) (maritime policy is to make plaintiff whole even at expense of increased burden to defendants), *cert. denied*, 510 U.S. 1195 (1994); Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1429-30 (5th Cir. 1988) (joint and several liability are coexistent with comparative fault in maritime law), *cert. denied*, 490 U.S. 1106 (1989); Gehres v. City of Phoenix, 753 P.2d 174, 177 (Ariz. Ct. App. 1987) (two defendants jointly liable for entire burden to plaintiff when defendants were found to be 2% and 3% negligent respectively, and plaintiff was found to be 95% negligent); Easton v. Strassburger, 152 Cal. App. 3d 90, 111 (1984) (joint and several liability applies to several defendants even where plaintiff is also at fault); Kampman v. Dunham, 560 P.2d 91, 92 (Colo. 1977) (en banc) (liability of joint tortfeasor remains joint and several where innocent third party seeks recovery for injuries resulting from joint tortfeasor's negligence); Walt Disney World Co. v. Wood, 515 So.2d 198, 202 (Fla. 1987) (joint and several liability is not unjust when jurisdiction has pure

err in three respects: They ignore history,[197] their logic is wrong,[198] and they fail to recognize the magnitude of the harm done to the right to trial by jury.[199] This is a situation in which the sum of two good parts yields a negative result serving largely to impose an unfair burden on solvent defendants.[200]

---

comparative negligence statute); Ferdig v. Melitta, Inc., 320 N.W.2d 369, 374 (Mich. Ct. App. 1982) (in product liability cases, comparatively negligent plaintiff is entitled to collect entire amount of damages from joint tortfeasor regardless of assignment of fault between the defendants); Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613, 617 (Okla. 1980) (where injured party is not negligent, there is still joint and several liability among tortfeasors).

197. Joint and several liability developed out of a common law tradition of a unitary cause of action in which apportionment was not possible and to which contributory negligence was a total defense. *See* Gregory C. Sisk, *Comparative Fault and Common Sense*, 30 GONZ. L. REV. 29, 31 (1995/1996) (common law plaintiff could collect all damages from one or more joint tortfeasors and liability for entire amount of damages fell on each tortfeasor regardless of any individual percentage of fault). Comparative negligence is the antithesis of this tradition.

198. The crux of the flawed logic rests in the fact that the jury is making two independent determinations. The first determination is that the injured party is entitled to a specific sum of money to compensate that party for harm. The second determination is that more than one party caused the harm, with each party responsible for making plaintiff whole to the extent of individual contributions to the harm. Joint and several liability is compatible with comparative negligence only if the second jury determination is subordinated to the first jury determination. The jury finding does not do this. It is not appropriate for the court or the legislature to substitute its judgment for that of the jury. Whether a jury instruction would cure the problem is an open question. *See* Luna v. Shockey Sheet Metal & Welding Co., 743 P.2d 61, 64-65 (Idaho 1987) (it is appropriate to instruct juries on effects of their findings relating to joint and several liability because informed jury will examine case's facts more closely before making decision); DeCelles v. State Dep't of Highways, 795 P.2d 419, 420-21 (Mont. 1990) (arguing that trend permitting juries to consider effect of percentage findings for joint and several liability is favorable because juries consider the effects of their findings anyway); Roman v. Mitchell, 413 A.2d 322, 327 (N.J. 1980) (in comparative negligence situations an "ultimate outcome" instruction should be given so that allocation is not made in a vacuum or as a result of the jury misunderstanding the law); Flood v. Southland Corp., 601 N.E.2d 23, 31 (Mass. App. Ct. 1992) (trial court shall have discretion in deciding whether to instruct jury about legal consequences of their findings where several parties are affected), *aff'd*, 616 N.E.2d 1068 (Mass. 1993); Elliot Talenfeld, *Instructing the Jury As to the Effect of Joint and Several Liability: Time for the Court to Address the Issue on the Merits*, 20 ARIZ. ST. L.J. 925, 930-37, 941-42 (1988) (showcasing modern trend to instruct juries on effect of joint and several liability). Recognition of the need for such an instruction is one manifestation of the problem caused by this "unholy alliance."

199. For example, the *Coats* court rejected a claim that the merger of these doctrines violated the Seventh Amendment. *Coats*, 5 F.3d at 890. Within the one short paragraph devoted to the point the court reasoned that the right of contribution meant that the jury's findings are followed. Though observing that the ideal end result would be the same without joint and several liability, the court gave no attention to the fact that contribution rights are often barren. This court's cursory analysis must be rejected.

200. That the two doctrines cannot be merged has been recognized. Upon adopting principles of comparative fault, a recent decision explained that "having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule of joint and several liability which may fortuitously impose a degree of liability that is out of all proportion to fault." McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992). *See also* Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1139-40 (1989) (arguing that joint and several liability effectively negates concept of comparative negligence, imposes 100% burden on many defendants who are less than 100%

Where the proposed statute requires a defendant to assume joint and several liability for economic loss sustained by a tort victim, it is declaring that the victim is entitled to full compensation for such loss.[201] Even though a logical distinction can be made between economic loss and noneconomic loss which explains the legislative determination to protect victims more fully against economic loss, this does not justify its obvious encroachment upon the policy against imposition of insurer liability.[202] Of even greater concern, this method of imposing liability violates the right to trial by jury.[203]

This conclusion, though at first blush surprising, is fully consistent with Ohio Supreme Court precedent defining the jury function. In cases to which the right to trial by jury applies, the right is "inviolate."[204] This right is fundamental, substantive, and included within it "is the right to have a jury determine all questions of fact, *including the amount of damages* to which the plaintiff is entitled."[205] In *Galayda v. Lake Hospital Systems*,[206] the court held that the right to trial by jury was violated by a statute which provided for periodic payments of judgments because this procedure reduced the value of the award determined by the jury.[207]

---

negligent, and discourages settlements). "The common-law joint and several tortfeasor doctrine accentuates and exacerbates all the imperfections that exist in the present tort compensation system." *Id.* at 1143.

201. Amend. Sub. H.B. 350 §§ 2307.31(B)(1)(a)-(b), (B)(2).

202. As was always the case with joint and several liability, one tortfeasor can be forced to pay the share of judgment owed by one or more other tortfeasors and thereby becomes the insurer of that party's obligation. The right to contribution in such cases, though present pursuant to Ohio Rev. Code §§ 2307.31-2307.33, is often of limited value. The primary situation in which a given defendant will be required to pay more than its share arises when another tortfeasor is unable to pay.

203. This section, however, appears consistent with the due process and equal protection rights of defendants. Retention of joint and several liability, in this limited context, provides a benefit to society by protecting and compensating a tort victim at the expense of a single significantly culpable tortfeasor. Such a benefit is neither arbitrary nor unreasonable. The distinction between tortfeasors more than 50% culpable and those just slightly less culpable, though rational, is more problematic. The distinction between objectively ascertainable economic loss and purely subjective noneconomic loss is well taken. To the extent that the merger protects injured parties, it is consistent with the court's philosophy in favor of full compensation for actionable personal injury and other factors which support the doctrine of strict liability in tort. These conclusions support the statute under a rational basis or even an intermediate level review. They might change under a strict scrutiny analysis. Such an analysis would be redundant as it would apply only if the merger had already been deemed invalid for violation of the right to trial by jury.

204. Article I, § 5 of the Ohio Constitution applies to actions which existed at the time the constitution was adopted. *See, e.g.*, Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 741-42 (Ohio 1992), in which the court held that the right to attorney fees was beyond the purview of the right to trial by jury as there was no such action at common law.

205. Galayda v. Lake Hosp. Sys., 644 N.E.2d 298, 301 (Ohio 1994) (emphasis added) (citing Sorrell v. Thevenir, 633 N.E.2d 504, 510 (Ohio 1994)), *cert. denied*, 116 S. Ct. 57 (1995). *See also* Jeanne v. Hawkes Hosp. of Mt. Carmel, 598 N.E.2d 1174, 1180 (Ohio Ct. App. 1991) (reiterating that right to jury trial is substantive right which may not be abridged).

206. 644 N.E.2d 298 (Ohio 1994), *cert. denied*, 116 S. Ct. 57 (1995).

207. *Id.* at 302.

The decisions that stress that the jury right includes the right to establish damages, address the issue in the context of fixing damages and then protecting the injured party from interference with that judgment. There is no logical reason to justify a distinction in the right to a jury verdict based on whether its benefits accrue to the injured party or the tortfeasor. The jury, in its rendering of a comparative negligence verdict, has specifically stated that defendant "A" is liable for x percent of the economic loss. The jury has not said defendant "A" is liable for x percent + y percent if defendant "B" cannot pay its share. Here, far more than in *Galayda*, the rule of law affects the value of the judgment. It raises the value of the judgment against the relevant defendant or, posed another way, it diminishes the value of that judgment to that defendant by rendering it nugatory.

If the jury determines that defendant "A" owes 60% of a $100,000 economic loss, the legislature has no right to increase the obligation from $60,000 to $100,000 no matter how laudable its objectives. What the General Assembly has not recognized is that defendants, not just plaintiffs, have a vested right in jury verdicts. Article I, Section 5 of the Ohio Constitution declares that "the right to trial by jury shall be inviolate."[208] This provision does not distinguish between tortfeasors and tort victims.

The inherent inconsistency in this legislation must be resolved to permit constitutional compliance. As the benefits of comparative fault are substantial, and have long been recognized as necessary to obviate the harshness of the contributory negligence doctrine, the best resolution of the issue is complete abrogation of joint and several liability. Although this will cause some victims a loss of compensation, it is consistent with the Constitution, provides equivalent and necessary protections to defendants, makes clear that a defendant's liability or culpability has limits, and guarantees that defendants are not cast into the role of insurers.

2. Statutes of Repose: Product Liability and Medical Malpractice

If precedents reveal anything, those of the Ohio Supreme Court establish that statutes of repose and various forms of statutes of limitations are an anathema to the court and will be struck down whenever and however possible.[209] It is likely, therefore, that proposed Ohio Revised Code sections 2305.10(C) (product liability) and 2305.11(A)(2)(a) (medical malpractice) will not survive constitutional scrutiny. This failure is likely despite the fact that both sections are drafted with an intent to meet constitutional demands by providing a balance between the rights of injured parties to receive just

208. OHIO CONST. art. I, § 5. The merged doctrines undermine the right to trial by jury in a manner similar to, though the converse of, the reduction of judgment rejected in *Sorrell*. In a similar manner, there is some deprivation of the defendant's right to meaningful court access. See *supra* notes 57-58 and accompanying text for a discussion of *Sorrell*. In this context, any distinction between plaintiffs and defendants may also offend equal protection.

209. See *supra* notes 14, 69-76 and accompanying text for discussion of illustrative decisions.

compensation and the need to provide potential defendants with a modicum of protection beyond the limited benefits of a statute of limitations.

The repose period for product liability claims protects manufacturers and suppliers against claims brought more than fifteen years from the date the product was delivered to "its first purchaser or lessee who was not engaged in a business in which the product was used as a component . . . of another product."[210] The bar is inapplicable to cases of fraud, express written warranties of longer duration, or where the action accrues during the fifteen year period but less than two years prior to expiration of that period—in which case action may be commenced within two years after the cause of action accrues.[211] The proposed statute also allows for a two year period to bring an action after a disability of minority or mental incapacity has been removed and includes a discovery rule for claims based on exposure to products described in Ohio Revised Code section 2305.10(B).[212]

The repose period for medical malpractice claims bars such claims six years after the date of the occurrence or omission which constitutes the basis for the claim.[213] This bar is not applicable in cases of fraud and, as with the product liability section, permits those suffering from the disabilities of minority or mental incapacity to bring actions within two years after removal of the disability.

These provisions are designed to overcome the case law which invalidated statutes that gave inadequate protection to minors, that failed to include an adequate discovery rule for latent disease situations, and failed to leave the courthouse door open for an adequate period of time. These, and other purposes, are consistent with legislative intent. Specifically, as to the product liability provision, the intent is stated to include: recognition that, subsequent to delivery of a product, the manufacturer or supplier lacks control over it, over its uses, and over the conditions under which the product is used; that under such circumstances it is more appropriate for those who have control over the product to bear responsibility for it; that after fifteen years it is difficult for a manufacturer or supplier to retain or locate reliable evidence as to design, production, and marketing of the product; that it is inappropriate to apply current technological and legal standards to products of this age; and that the statute will enhance the competitiveness of Ohio manufacturing companies.[214]

The concluding paragraph of the legislative intent may be critical to future judicial analysis and provides that the proposed statute:

> strike[s] a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers and to declare that the fifteen-year statutes [sic] of repose . . . are rational periods . . . intended to preclude the problems of stale litigation but

210. Amend. Sub. H.B. 350 § 2305.10(C)(1).
211. *Id.* § 2305.10(C)(2)-(4).
212. *Id.* § 2305.10(C)(5).
213. *Id.* § 2305.11(A)(2)(a).
214. *Id.* § 5(L)(5)-(9).

> not to affect civil actions against those in actual control and possession of a product at the time that product causes an injury . . . .[215]

Regardless of whether the legislature is correct in its beliefs, there is little doubt that these beliefs are reasonable. As there is a strong presumption that legislation is constitutional[216] and must be upheld against claims of an equal protection violation if there is "any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective,"[217] the product liability repose statute should be upheld as against any claim of an equal protection violation. Product liability claims are unique in comparison to traditional negligence-based or intentional tort-based claims because only they allow injured parties to recover without regard to fault. Recognition of this legal distinction is rational and serves a substantial number of legitimate purposes.

There is no doubt that this type of statute bears a real and substantial relationship to the public health and safety. This reality applies with equal force to both equal protection and due process concerns. The proposed repose statute will pass due process muster (and, therefore, equal protection as well because the classification is rational) unless deemed "unreasonable or arbitrary."[218] The obvious problem is that drawing a time-line can always be attacked as lacking in reason or as established in an arbitrary manner. In light of the reasons provided by the legislature and the fact that this provision provides no claim preclusion for a very substantial time,[219] it should overcome any due process attack.

The legislative intent regarding the medical malpractice provision also establishes a sound basis to uphold the provision against both due process and equal protection violation assertions. Much of the legislative rationale parallels that provided in regard to product liability, but a notable difference is found in that a shorter time frame was selected "because the testimony presented to the General Assembly . . . demonstrated that a six-year period is the appropriate point to bring an end to stale claims."[220]

Although the court should uphold both statutes in regard to equal protection and due process concerns, such a result is questionable. The court could even seize upon the fact that the time frame selected for medical mal-

---

215. *Id.* § 5(L)(10).

216. State *ex rel* Jackman v. Court of Common Pleas, 224 N.E.2d 906, 908-09 (Ohio 1967).

217. Denicola v. Providence Hosp., 387 N.E.2d 231, 234 (Ohio 1979)).

218. Morris v. Savoy, 387 N.E.2d 765, 769 (quoting Mominee v. Scherbarth, 503 N.E.2d 717, 720-21 (Ohio 1986)).

219. Relatively early studies and decisions indicate that over 97% of product-related injury takes place within six years of product purchase. *See* Werber, *supra* note 2, at 1035. At least 10 states have upheld product liability repose statutes of shorter duration. *Id.* at App. It should be evident that the Ohio legislation will affect a small number of persons yet protect manufacturers and suppliers against the most egregious of delayed claims. Such a result is neither unreasonable nor arbitrary. This result is proper under Ohio law without regard to whether a national product liability statute of repose would offend due process or equal protection mandates of the United States Constitution.

220. Amend. Sub. H.B. 350 § 5(G)(5).

practice is based on testimony whereas there is no testimony cited in support of the product liability time frame. This flaw in the legislative history could lend at least a modicum of support to a determination that the product liability statute violates the due process clause.

What is not questionable is that neither repose provision stands a realistic chance of surviving an attack grounded in the open courts provision of the Ohio Constitution. Despite their relatively limited application, both statutes will close the courthouse door to injured victims before the injury arises or the claim accrues. This result is, quite simply, not tolerable under existing Ohio decisional law.[221]

In finding that the ten-year repose provision applicable to those who made improvements to real property was invalid, the court recognized that the statute deprived plaintiff of the right to sue before plaintiff knew or could have known of the injury.[222] Article I, Section 16 of the Ohio Constitution requires that "[a]t a minimum . . . plaintiffs have a reasonable time to enter the courthouse to seek compensation *after* the accident."[223] As the repose statute closed the door in contravention of the express language of the Ohio Constitution, the *Brennaman* court opened that door by voiding the statute. The court is essentially rejecting a logic that places conclusions before their supporting premise is established.[224]

This holding was reached, in part, by reliance upon the earlier decision in *Burgess v. Eli Lilly & Co.*[225] This decision dealt with the discovery rule contained in the two-year personal injury statute of limitations.[226] The magistrate and lower court concluded that the action was barred because plaintiffs were aware that the injury may have occurred more than two years before this DES-based claim was filed. In reversing, the Ohio Supreme Court stressed that as the statute was triggered upon a possibility, it violated the open courts provision. The court reasoned that (1) a statute of limitations cannot begin to run before a claimant knew or should have known of the injury;[227] and (2) it makes sense that the government cannot begin to

---

221. Unless, of course, the court make-up changes and a new majority is formed that will once again reverse course and uphold the repose provisions on the strength of the decision and reasoning set forth in Sedar v. Knowlton Constr. Co., 551 N.E.2d 938, 940-49 (Ohio 1990), *overruled by* Brennaman v. R.M.I. Co., 639 N.E.2d 425, 430 (Ohio 1994).

222. Brennaman v. R.M.I. Co., 639 N.E.2d 425, 430 (Ohio 1994).

223. *Id.* (emphasis added).

224. In an oft-quoted passage utilized to reject repose statutes, it was asserted that:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry . . . or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists.

Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) (footnotes omitted).

225. 609 N.E.2d 140 (Ohio 1993).

226. OHIO REV. CODE ANN. § 2305.10.

227. *Burgess*, 609 N.E.2d at 141 (relying on line of cases culminating in Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709 (Ohio 1987)).

regulate the time in which a person has to bring a claim for an injury until the potential claimant knows both that she has an injury and its cause.[228] Finally, the court recognized that the open courts provision demands that a party be granted an opportunity to seek relief at a "'meaningful time and in a meaningful manner.'"[229]

Repose statutes, by definition and no matter how exception riddled, will allow some potential claimants no time in which to file an action seeking vindication of their rights through compensation for injury. This is the statute's purpose. Any assertion that such statutes do not deny the precepts of court access and remedy because they do not deny a remedy to a claimant who has a vested right, but instead bar the commencement of an action before any right accrues, must fail.[230]

As in *Brennaman* and *Burgess*, both the product liability and medical malpractice repose statutes fail to allow *all* wrongfully injured persons a reasonable time to bring suit after their claim manifests. Though many of the problems previously identified by the court are resolved through the built-in exceptions to application of the repose periods, the preclusion of any claimant, regardless of its eminent good sense, makes the demise of both proposed statutes rather certain.

3. Limitations on Compensatory and Punitive Damages

There are instances in which juries award excessive noneconomic loss and/or punitive damages. When such awards and their frequency are excessive remain highly debatable issues. Nevertheless, legislative bodies, including the Ohio General Assembly, desire to control the amount of such awards by imposing some form of ceiling upon them.[231] In theory such statutes will allow a fair award of noneconomic damages and sufficient punitive damages so as to deter wrongdoing without bankrupting "good" businesses or defendants. Several provisions of the pending legislation seek to impose dollar ceil-

---

228. *Id.* at 142 (citing Hardy v. VerMeulen, 512 N.E.2d 626 (Ohio 1987), *cert. denied*, 484 U.S. 1066 (1988)).

229. *Id.* (quoting *Hardy*, 512 N.E.2d at 628).

230. This line of analysis remains valid in regard to statutory wrongful death actions and is offered as a rationale by the legislature in Amend. Sub. H.B. 350 § 5(L)(2). It was relied upon by the court in *Sedar* and by the Chief Justice's dissent in *Brennaman*. *See* Sedar v. Knowlton Constr. Co., 551 N.E.2d 938 (Ohio 1990), *overruled by* Brennaman v. R.M.I. Co., 639 N.E.2d 425 (Ohio 1994); *Brennaman*, 639 N.E.2d at 432 (Moyer, C.J., concurring in part and dissenting in part).

Discussion of a potential right to trial by jury violation has been omitted here because, if the statute fails on an open courts analysis, this complementary right is clearly denied. If the court returns to *Sedar*-type reasoning to conclude that the claim never arose and therefore the statutes do not violate the open courts provision, then there is no predicate action upon which to base a right to trial by jury claim. Note, however, that the court may find a violation of the right to justify application of strict scrutiny in any analysis of due process concerns.

231. For example, § 107 of the Federal Act, *supra* note 102, sought to impose a ceiling on punitive damages.

ings on awards of both noneconomic loss compensatory damages and punitive damages.

Proposed amendments to Ohio Revised Code section 2315.21, applicable to tort actions including product liability claims and death actions, provide that punitive damages may not exceed "three times the amount of the compensatory damages awarded to the plaintiff or two hundred fifty thousand dollars, whichever is greater."[232] Similarly, proposed Ohio Revised Code section 2323.54, applicable to all tort actions including product liability claims and death actions, provides that after a fact-finder determination of noneconomic loss the court shall enter judgment in a sum no greater than two hundred fifty thousand dollars or four times the amount of plaintiff's economic loss to a maximum of five hundred thousand dollars.[233] In cases of severe injury the award for noneconomic damages may reach one million dollars.[234] These provisions, no matter how merited and regardless of their fairness, are doomed.

As both noneconomic loss damages and punitive damages are within the protection of the Ohio Constitution, the arguments against both are similar. The propriety of a unitary analytic approach is also supported by the fact that both provisions are predicated on multiples of the economic loss damages awarded.[235] The distinction in regard to the maximum damages for noneconomic loss based on the severity of injury represents a well-conceived approach that provides a degree of fairness that would not exist with a single cap approach. It is, however, insufficient to overcome an inevitable constitutional attack.

The first level of attack will be that these ceilings violate the right to trial by jury. This approach led the court in *Zoppo v. Homestead Insurance*[236] to void former section 2315.21(C)(2) of the Ohio Revised Code as that section required the court, rather than the jury, to determine the amount of punitive damages.[237] Only Justice Wright urged that issues relating to the amount of

---

232. Amend. Sub. H.B. 350 § 2315.21(D)(1)(a). Because punitive damages are not recoverable under the Ohio Wrongful Death Act, the inclusion of "death" claims under § 2315.21(A)(4) is more confusing than beneficial.

233. Sub. H.B. 350 § 2323.54(B)(1). Of course, if the jury verdict is for a lesser sum, that sum will become the final judgment.

234. *Id.* § 2323.54(B)(2). In cases of permanent and substantial disfigurement, deformity, loss of use of a limb, loss of bodily function, or permanent physical functional injury making a person unable to independently care for herself or himself and perform life sustaining activities, the amount of judgment may reach one million dollars. *Id.*

235. A somewhat distinct area is that of wrongful death actions where Article 19a, § 1 of the Ohio Constitution precludes damages limitations. The proposed statute may be inconsistent with this provision. *Compare* Amend. Sub. H.B. 350 § 5(P)(6) (imposing ceiling on damages for noneconomic loss) *with* Morris v. Savoy, 576 N.E.2d 765, 771 (Ohio 1991) (holding statute limiting damages in medical malpractice cases unconstitutional); *and* Samuels v. Coil Bar Corp., 61 Ohio Misc. 2d 407, 410 (1991) (finding statute limiting damages recoverable in tort actions unconstitutional under Article I, § 19 of Ohio Constitution).

236. 644 N.E.2d 397 (Ohio 1994).

237. *Id.* at 401. See *supra* Part III.A.7 for a discussion of related punitive damages issues.

punitive damages did not implicate the right to trial by jury.[238] His thesis, in large part, was that "[b]ecause the legislature has the authority to abolish punitive damages, it may also regulate them."[239] This voice of reason will not be heard when the proposed ceiling legislation reaches the court. Thus, both the punitive damages and noneconomic loss provisions will be reviewed against the right to trial by jury.

The logic and law that support defendants' arguments that the merger of joint and several liability with comparative negligence violates the right to trial by jury will be invoked to attack these ceilings.[240] The jury is to determine all facts, including damages. Justice Sweeney's reasoning in *Morris v. Savoy*[241] is compelling in this context. Although the violation in *Morris* was based on a judicial reduction of judgment after a jury determination, the right to determine initially the amount of appropriate compensation or punishment must be equally free of substantial impairment.[242] That these statutes may be viewed as a prior restraint upon the jury, rather than a subsequent judicial adjustment, is a distinction lacking constitutional meaning.[243]

The plurality reasoning in *Morris* discussed alternative approaches to void a ceiling on the amount of general damages which could be awarded in a medical malpractice action.[244] The plurality opinion applied the due process clause to void the statute and strongly indicated that this particular statute would fail under equal protection analysis.[245] A separate opinion argued

---

238. *Id.* at 402 (Wright, J., dissenting). Judge Wright argued that only compensatory damages were so "fundamental" as to necessitate a jury determination. He also reasoned that as there is no "right" to punitive damages, the legislature had the authority to remove this determination from the hands of the jury. *Id.* at 403-04.

239. *Id.* at 404 (Wright, J., dissenting) (relying on Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring)). See *supra* note 66 for a brief discussion of Justice Scalia's concurrence in *Pacific Mutual*. *See also* Smith v. Printup, 886 P.2d 985, 994 (Kan. 1993) (legislature could abolish punitive damages without infringing on plaintiff's constitutional rights because plaintiffs have no rights to punitive damages).

240. See *supra* Part III.C.1.

241. 576 N.E.2d 765, 777 (Ohio 1991) (Sweeney, J., concurring in part and dissenting in part). See *supra* notes 38-45, and accompanying text for a discussion of Justice Sweeney's argument.

242. *Id.* at 768.

243. The analogy is, of course, to First Amendment concerns. The Ohio Supreme Court has shown a deep appreciation for such concerns. *See* City of Seven Hills v. Aryan Nations, 667 N.E.2d 942, 946 (Ohio 1996) (recognizing enjoyment of picketing as incidental to speech had effect of unconstitutionally restricting content-based speech).

244. *Morris*, 576 N.E.2d at 769. The opinion recites the conflicting authority from other jurisdictions and distinguishes two of the five cases listed which upheld such limitations. *Id.* One appellate court has held that a ceiling on damages applicable to political subdivisions violated the right to trial by jury and failed strict scrutiny under both the Due Process and Equal Protection Clauses. Gladdon v. Greater Cleveland Regional Transit Auth., No. 64029, 1994 WL 78468, at *3 (Ohio Ct. App., Cuyahoga County March 10, 1994), *rev'd on other grounds*, 662 N.E.2d 287 (Ohio 1996). The validity and precedential effect of the appellate decision, in light of Buchman v. Board of Educ., 652 N.E.2d 952 (Ohio 1995), and other decisions is questionable. See *supra* note 59 for a related discussion.

245. See *supra* notes 27-37 and accompanying text for a discussion of these points. The proposed statute, as it is far more encompassing than that considered in *Morris*, most likely

that an open courts violation existed because this provision must be interpreted and applied in conjunction with the right to trial by jury.[246] Thus, the open court provision:

> [N]ot only protects the right to file a lawsuit, but also protects the right to a judgment (or verdict) which is properly rendered . . . since, after all, it is the obtaining of damages which truly counts. To allow the General Assembly to encroach upon the right to obtain redress of injuries is to subordinate a constitutional right to the will of the General Assembly. The court should not abdicate its responsibility while constitutional rights are whittled away . . . .[247]

Any ceiling, no matter how generous, is subject to due process attack as arbitrary, inasmuch as no empirical data can justify a given limit.[248] Moreover, once the right to establish a ceiling is established, that ceiling can be lowered. The court, even if convinced that the selected ceiling numbers are somehow rational and reasonable, will not allow the General Assembly to start down the slope of damage limits. Any limitation upon a jury's capacity to determine the full scope of damages is in direct conflict with the right to trial by jury and may well violate the open courts provision.

IV. CONCLUSION

Ohio tort law is about to be changed in a dramatic and comprehensive manner. House Bill 350 will be enacted as a major piece of tort reform legislation with provisions substantially like those discussed herein. The vast majority of this legislative change is directed to areas of the law in need of change and the restoration of balance. Most of the proposed changes either raise no constitutional concerns or should be deemed in compliance with the Ohio Constitution. In a few areas, most notably statutes of repose and limitations on damages, the governmental need is weak, the effect drastic, and

---

would survive an equal protection attack. However, if the court finds a violation of the right to trial by jury, it could apply a strict scrutiny analysis which might well yield an equal protection or due process violation. *Cf.* Sorrell v. Thevenir, 633 N.E.2d 504, 512-13 (Ohio 1994) (applying strict scrutiny analysis to equal protection challenge to medical malpractice recovery statute).

The extent to which damage limitations serve a compelling governmental interest is, to say the least, debatable. The absence of empirical evidence of the effects of high judgments, coupled with the relatively few such verdicts, makes it hard to find that limiting such awards promotes a compelling interest. On the other hand, substantial punitive damages, which are not insurable under Ohio law, could put a good employer out of business and displace substantial numbers of employees for past misconduct which has been rectified. Protecting businesses and their employees would promote a strong, perhaps compelling, governmental interest.

246. *Morris*, 576 N.E.2d at 782 (Sweeney, J., concurring in part and dissenting in part) (citing Smith v. Department of Ins., 507 So.2d 1080, 1088-89 (Fla. 1987)).

247. *Id.* at 782-83 (Sweeney, J., concurring in part and dissenting in part). Of course, the court did not abdicate its responsibility as it did hold the statute unconstitutional on other grounds.

248. *See* Rustad, *supra* note 182, at 15-16. It should be apparent that in various relevant contexts the Ohio Supreme Court has applied rational basis, intermediate scrutiny, and strict scrutiny. Only a soothsayer knows which standard will be applied to a given set of facts as applied to a given statute.

the likelihood of defending against constitutional attack is minimal. As this round of legislative tort reform will largely level the playing field, even without its unconstitutional provisions, it should well serve the citizens of Ohio and the civil justice system.[249]

249. Due to publishing constraints this Article could not be changed to reflect the fact that the Tort Reform Act will take effect on January 26, 1997.

APPENDIX: OHIO CONSTITUTIONAL PROVISIONS

Article I, Section 2: Equal Protection; Privilege and Immunities:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Article I, Section 5: Trial by Jury:

> The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of no less than three-fourths of the jury.

Article I, Section 16: Open Courts or Right-to-Remedy and Due Process:

> 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.