

## Tort Reform in the Courts

In the future, tort reformers must take their battle to the courts to change outdated laws. After all, the plaintiffs' bar has had great success in petitioning courts to create new causes of action. For those looking for reform, it won't be easy or inexpensive, but it will be worthwhile.

By Steven B. Hantler



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In the war over tort reform, the battlefield keeps shifting. Historically, the battlefronts have been in state legislatures and Congress. Beginning in 2000, the battle lines moved to the state level over issue advocacy about the records of candidates for state supreme court and attorney general. In the last two years, the line extended to the records of those running for gubernatorial and state legislative offices.

Looking to the future, the logical extension of these trends, consistent with *stare decisis*, is tort reform in the courts. Or to put it another way, litigants should petition trial courts and especially appellate courts to revisit decisions no longer justified because of changes in the law or facts. After all, the plaintiffs' bar has not hesitated to petition the courts to create new causes of action, even though that is a legislative function. Thanks to what some refer to as "Trial Lawyers, Inc.," there are now actions for

medical monitoring by people who are not injured and claims against entire industries that their lawful products constitute a "public nuisance," among other examples.

Consistent with *stare decisis* and the separation of powers, it is time for tort reformers to provide an appropriate counterweight in the courts to "Trial Lawyers, Inc." A good starting point is arcane and discriminatory rules of evidence that deliberately blind jurors from hearing "the whole truth" in lawsuits, to the

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disadvantage of defendants. Jurors in 32 states cannot hear that a plaintiff in a product-liability lawsuit was not wearing a seatbelt. In many asbestos magnet courts, jurors will never know that a plaintiff was exposed to asbestos from sources other than the named defendant. This is material information that goes directly to their task of assessing all relevant facts and seeking the truth.

## Let In The Sunshine

Jurors may also be unaware of legal rules, such as joint liability, that affect the practical outcome of their decisions. When the rationale for these rules is no longer sound, courts are duty bound to re-examine them.

For example, the exclusion of seatbelt nonuse arose in the years when seatbelts were relatively new and untested. Experts at that time predicted that one-third or fewer occupants would use seatbelts, and most state laws

provided contributory negligence as a defense in auto cases. In this context, it may have been appropriate to exclude seatbelt evidence from a jury. But, today, we know that seat-

belts are one of the most effective restraint systems, usage is in the 80-90 percent (and higher) range nationwide and most states have replaced contributory negligence regimes with comparative fault. The rationale for keeping seatbelt evidence from jurors is no longer justified, if it ever was.

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Fortunately, in contrast with some courts, jurisdictions with "sunshine rules" have decided juries should learn the effects of joint liability. These courts put faith in juries to handle knowledge of the way the law operates. The Supreme Court of Hawaii's adoption of the sunshine rule is a leading example of tort reform in the courts. In *Kaao v. Davis*, a passenger injured in a car accident

sued a drunk driver and the City of Honolulu for failure to maintain its roadways. The city's lawyer asked the trial court to instruct the jury that if it found a defendant even one percent liable, that defendant may be required to pay the entire judgment. The trial judge refused, but the Hawaii Supreme Court reversed this decision, in effect adopting the sunshine rule.

Achieving tort reform in the courts requires a coordinated plan for change and the fortitude to appeal the right cases to obtain a rule-changing decision from a state's highest court. In an article I co-authored with Victor E. Schwartz, "Moving Toward the Fully Informed Civil Jury," we identify five rules meriting such re-examination and the basis for doing so. (See "Rules Requiring Re-examination." The entire article is available on the American Justice Partnership website at [www.AmericanJusticePartnership.org](http://www.AmericanJusticePartnership.org).) A practice guide with

sample motions and jury instructions will also be available on the website.

Tort reform in the courts will require more time, cost and effort. To succeed, in-house counsel must be willing to incur the slightly higher costs of preserving these issues for appeal and taking appeals in appropriate cases. Outside counsel also have a role, and that is to identify the opportunities for tort reform in the courts in their states. Together we can get it done.

*Steven B. Hantler is assistant general counsel for government and regulation at DaimlerChrysler Corporation. E-mail him at [sbh2@daimlerchrysler.com](mailto:sbh2@daimlerchrysler.com).*

## RULES REQUIRING RE-EXAMINATION Should Jurors Be Allowed To Know:

1. Whether a plaintiff has already received compensation for an injury, i.e., the collateral source rule?
2. Whether a plaintiff was wearing a seatbelt?
3. Whether a plaintiff was exposed to asbestos from sources other than the named defendants?
4. The effect of joint liability, i.e., that if it finds a defendant only 5% or 10% liable, that defendant may end up paying 100% of the damages awarded?
5. In a product liability lawsuit, whether the driver of a vehicle was under the influence of alcohol or drugs or asleep at the wheel? (This can be extended to other situations where the plaintiff's wrongful conduct is not known to the jury.)