



# POLICY PERSPECTIVES

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## Making Good on the Harm You Cause South Carolina Consumers and Tort Reform

You've seen the ads about a "lawsuit crisis". You've read about doctors in West Virginia walking out. And you've seen the newspaper articles about federal efforts to cap what health care professionals have to pay when they commit malpractice and injure their patients.

At the federal level, President George W. Bush has been pushing tort reform in the guise of medical malpractice reform. Senator Lindsey Graham called the bill "one of the worst pieces of legislation I have ever seen." According to reports in *The State* "This bill . . . is not about legal reform," said Graham, who added Republicans should be 'ashamed' of it because juries, not the federal government, should decide damages."

In South Carolina a coalition of health care professionals and big business have come together to push comprehensive legislation to undermine the ability of ordinary citizens to recover damages when they are harmed. That legislation ([S. 446](#) and [H. 3744](#)) includes just about every bad idea we have seen over our seventeen years of protecting consumers. In this effort, big business is hiding behind the doctors and their complaints about malpractice premiums. But the legislation applies to all tort actions and protects the toxic polluter and drunk driver every bit as much as your physician.

If you listen to the advocates of tort reform, this is simply a battle between kindly doctors unable to afford looking out for their patients and greedy lawyers who foment frivolous lawsuits.

**But tort reform is really about shifting the responsibility for failing to meet a legal duty from the person who causes an injury to the person who sustains it.** Big businesses support tort reform because it shifts the societal costs of pollution and dangerous products from the books of business onto injured consumers and taxpayers. It is a form of accounting fraud as bad as that practiced by corporate giants like Enron and WorldCom. In economics terms, it externalizes costs, moving the very real costs caused by bad behavior off the corporate books. But those costs are real. And they end up on the backs of injured consumers.

This *Policy Perspective* will look at a number of the proposals made in the deceptively titled "South Carolina Economic Development, Citizens and Small Business Protections Act of 2003." There are so many that we frankly can't cover them all in this format.

### What's a Tort?

Tort law deals with injuries or harm which follow from a failure to meet a legal duty. Torts are civil matters, not criminal. Torts can flow from negligence or be intentional. You can't have a tort unless a person or corporation has a legal duty to the person they harm and fail to meet that duty.

Torts cover a broad range of actions including medical malpractice, toxic pollution, car wrecks, legal malpractice, slip and fall accidents in stores, failure to protect children from predatory clergy and products that injure consumers.

Tort law developed out of the Common Law—made by judges to arrive at fair results when people were harmed by others. Legislatures have also passed numerous laws to modify the Common Law.

## “OH, WELL. TOO BAD”—CAPPING NONECONOMIC DAMAGES

When we started working on tort reform in the late 1980s, big business sought to cap so-called “noneconomic damages” at \$250,000. Nearly twenty years later, the proposal has not changed.

“Noneconomic damages” are compensatory damages which don’t have a ready price-tag. Medical costs are pretty easy to add up. Lost wages can fairly readily be ascertained. Proponents of tort reform sum up “non-economic damages” as “pain and suffering”—as if demanding compensation for pain and suffering were somehow unseemly. “Noneconomic damages” encompass a range of damages including, to quote the legislation, “pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, other nonpecuniary damages, and any other theory of damages including, but not limited to, fear of loss, illness, or injury.” For the elderly, low-income workers, children or homemakers, “noneconomic damages” are often the only damages.

**“She did not lose her life, and with plastic surgery, she’ll have breast reconstruction better than she had before. It won’t be National Geographic, hanging to her knees. It’ll be nice firm breasts.”**

Dr. Harry J. Metropol of Columbia arguing in to the House Constitutional Laws Subcommittee that Linda McDougal, who lost both breasts following a misdiagnosis of breast cancer, had no reason to complain

### IS THERE A MEDICAL MALPRACTICE CRISIS?

Yes. But it’s not the one the doctors are telling you about. According to the federal Institute of Medicine’s Committee on Quality of Health Care in America, somewhere between 44,000 and 98,000 American are killed each year due to medical errors in hospitals alone. (Kohn, et al., *To Err is Human: Building a Safer Health System*. Washington, D.C.: National Academy Press, 2003.) As *To Err is Human* notes: “More people die in a given year as a result of medical errors than from motor vehicle accidents (43,458), breast cancer (42,297), or AIDS (16,516). Total national costs (lost income, lost household production, disability and health care costs) of preventable adverse events (medical errors resulting in injury) are estimated to be between \$17 billion and \$29 billion, of which health care costs represent over one-half.” These figures are only for deaths in hospitals.

An examination of [Board of Medical Examiners disciplinary actions](#) shows little focus on poor doctoring—unless related to substance abuse or inappropriate sexual behavior.

Rather than focusing on escaping responsibility for their errors, health care professionals should be reducing the costs of medical malpractice by reducing medical malpractice. That would mean: 1) a serious commitment to enhancing the knowledge base about medical errors; 2) strong, mandatory reporting; 3) higher safety standards, expectations and oversight; and 4) systemic changes to health care safety systems at the delivery level.

your leg. We suspect that awards would escalate dramatically.

What tort reform proponents are really saying with caps is: “We don’t really care what we do to you. We’ll cover your hospital and doctor’s bills and lost time. But after that . . . Oh well. Too bad.”

Proponents argue that “noneconomic damages” are subjective—and therefore not real. Clearly, there is no market price on disfigurement. But, all valuation—absent an efficient market—is subjective. The twenty-three largest publicly traded companies paid their top executives from \$260,960 to \$2,110,110 in 2002 according to *The State*. Not one of those executives has proposed capping their compensation at \$250,000 because subjective factors intrude in arriving at them.

In addition, proponents of caps suggest that “noneconomic damages” compensate for losses you can’t really be compensated for. Therefore, you should get no economic compensation. Historically, justice operated on a retributive basis. If you put out my eye, I would put out your eye. If you killed my child, I took one of yours. Systems of monetary compensation developed to mediate the harshness of those systems. If juries can’t be trusted fairly to value disfigurement, then perhaps we could turn to a modified retributive justice system. If you kill my child while driving drunk, we’ll negotiate the price you pay me not to have to give up your child. If you cut off the wrong leg by accident in surgery, we’ll negotiate what you have to pay me to keep

## LETTING THE REALLY BAD GUYS SKATE—CAPPING PUNITIVE DAMAGES

Punitive or exemplary damages are intended both to punish and to deter bad acts. In the past, substantial punitive damages were often awarded where the damage to the individual plaintiff was low but the societal cost of the practice was high. The U.S. Supreme Court has recently significantly limited punitive damages by requiring that they have a relationship to the compensatory damages—probably limited by a multiple of less than 10 times compensatory damages. (See [State Farm Mutual Automobile Insurance Co. v. Campbell](#).)

Punitive damages are not all that common, especially in personal injury cases. And the typical punitive damage award is small—although a few very large damage awards drive the average up substantially.

**“Punitive damage awards of any kind are relatively infrequent events, for the most part, occurring in less than 4 percent of all civil jury verdicts . . . .”**

Rand Institute for Civil Justice Press Release, [“Study Shows Importance Of Financial Cases In Punitive Damages Debate; Personal Injuries Get The Headlines But Only Half Of The Punitive Awards,”](#) June 16, 1997.

Under current South Carolina standards, the plaintiff must demonstrate willful, wanton, reckless or intentional conduct resulting in actual damages by clear and convincing evidence. The proposed legislation would require the plaintiff to demonstrate fraud, specific intent to harm you or personal ill will towards you. Even gross negligence would not justify punitive damages. It’s not enough that I really just don’t care that I’m driving drunk, selling without warning asbestos that I’ve known for 40 years will kill a bunch of you, or putting tires on your SUV that I have plenty of notice are likely to fly apart at speed. This is essentially a criminal standard for punitive damages.

And even if I can prove that you engaged in fraud or intended to hurt me, you will pay no more than the lesser of \$250,000 or three times the compensatory damages. This essentially makes punitive damages in environmental pollution and defective products cases meaningless.

## “DOUBLE RECOVERIES”—SHIFTING THE BURDEN FROM YOUR INSURER TO MY EMPLOYER

If you are injured and your insurance company covers your medical bills, the proposed legislation would allow the person who injured you to tell that to the jury. Proponents claim that this eliminates “double recovery”—you pocketing money for bills your insurer paid. We know of no insurer which does not subrogate—collect from you whatever you collect from someone else.

The effect of telling the jury that your insurance company already paid your medical bills is that the jury will not require the person who injured you to pay those bills. This shifts the costs of that injury from you or your insurer to my insurer. In many cases, this is actually my employer or her insurance company. So my employer ends up eating the costs of your negligence.

## POST-JUDGMENT INTEREST

After a judgment is entered, it currently draws interest at 12 percent per year. Post-judgment interest compensates the winning party for the time value of money until she gets paid. South Carolina does not allow pre-judgment interest—interest on the damages between the time of the injury and the entry of judgment.

If the interest rate is higher than the cost of money to the appealing party, post-judgment interest pushes the losing party not to appeal regardless of the merits of their case. If the interest rate is too low, the losing party has an incentive to borrow cheap money from the winning party by appealing. A financially strapped winning party can be pushed to settle for less than a fair amount if the low interest rate leads the losing party to appeal a just award.

With the prime rate—the rate banks charge their best customer—at 4 percent, big businesses view 12 percent as extortionate. Over the past thirty years, however, [prime rates](#) have varied from the current low 4 percent to 21.5 percent.

Discussions at the General Assembly over the past few years have focused on prime rate—because that is the rate that big business pays. However, few injured consumers can borrow money at prime. Often, those consumers are forced to borrow money to pay bills until a judgment is affirmed on appeal. Depending upon the consumer and their economic status and history, those borrowings today can cost from slightly less than 5 percent on a first mortgage to 300 percent from a title lender.

Post-judgment interest applies, too, in non-tort cases where large commercial interests have prevailed over low-income consumers. Setting the post-judgment interest rate too high is an injustice there, too. **The just figure is not the appealing party's cost of money, but the injured consumer's cost of money and requires an individualized inquiry by the court—not just a one-size-fits-all number in the Code.**

### PRODUCTS LIABILITY TORT ACTIONS IMPROVE OUR LIVES AND MAKE US SAFER

“The window industry of the 1980s had not perfected dual-pane seals to the extent that was achieved during the 1990s. The costs of product-liability claims forced them to develop better materials and methods for sealing the glass edges.”

Barry Stone, Home Inspection, *The State*, July 13, 2003, p. G6

The simple reality is that corporate America far too often looks to the bottom line rather than what is best for its customers and society. Tort actions are an alternative to either a completely unaccountable society or a huge governmental bureaucracy regulating every action by businesses to ensure that they are not harming their customers or the environment. The tort law system forces on businesses the economic choice between making safe and functional products or paying the costs of judgments.

Distorted stories of [Stella Liebeck's lawsuit](#) against McDonald's have made it an example of a “frivolous” lawsuit justifying dismantling our civil justice system. Ms. Liebeck suffered third-degree burns over 6 percent of her body when attempting to remove the lid from her coffee. She wasn't driving and the car was stopped. McDonald's had had over 700 claims in the previous decade from persons similarly burned by coffee sold at or above 175 degrees Fahrenheit. Burn hazards from food exist at over 140 degrees. Ms. Liebeck was awarded \$200,000 in compensatory damages reduced to \$160,000 because she was, the jury said, 20 percent at fault. The jury initially awarded Ms. Liebeck two days of McDonald's coffee sales—\$2.7 million—as punitive damages. That's a lot of money to you and me but literally coffee change to McDonald's. The judge reduced that to \$480,000. McDonald's and Ms. Liebeck settled, presumably for even lower numbers, after these awards were announced. McDonald's customers are now safe from its coffee.

As a result of products liability cases, South Carolina school children are no longer transported in unsafe vans, Dalkon Shield IUDs no longer threaten women with severe pelvic infection, baby cribs no longer trap children's heads, women no longer die of toxic shock syndrome from use of Playtex tampons, Domino's Pizza drivers are no longer encouraged to speed and drive negligently to meet time deadlines, football helmets provide much better protection to our youth, flammable children's pajamas are off the market and asbestos will no longer be used to insulate our homes and schools.

Too often we hear the tort “horror stories”. You'd be well-advised to always get “the rest of the story” as many of these urban legends never happened or never happened the way you heard the story.

When manufacturers complain about the costs of potential tort liability, they are really complaining that they can be held accountable to make their products function properly and safely. It's a good thing. We shouldn't dismantle that accountability.

## CAPPING GOVERNMENTAL AND MEDICAID DAMAGES

At common law, the king was immune from suit—unless he agreed to be sued. South Carolina allows the state and its subdivisions to be sued for torts just like anyone else. However, unlike just about everyone else, the [Tort Claims Act](#) limits the amount that an injured consumer can receive in compensation when an employee of the state or one of its subdivisions commits a tort. For most claims this limit is \$300,000 per claim. However, for torts committed by licensed physicians or dentists, the limit is \$1.2 million per claim. These same limits also apply by reference to charities and their employees. As with other public or charitable employees, you sue the employing governmental entity rather than the physician or dentist. If the physician or dentist is paid by anyone other than the governmental employer when they commit the tort, they do not have these protections.

The proposed legislation does three things:

- It repeals all of the distinctions between medical malpractice claims and other claims, limiting recovery to \$300,000 per claim regardless of the actual damages.

In adopting the Tort Claims Act, the General Assembly found: “These higher limits and mandated coverages are recognition by the General Assembly of significantly higher damages in cases of medical malpractice.” The effect of this change is to cap all medical malpractice claims for torts committed by doctors and dentists employed by governmental or nonprofit hospitals and clinics at \$300,000—regardless of the significantly higher damages. This goes far beyond a cap on “noneconomic damages,” because this applies to both economic and “noneconomic damages”. One of the major health care changes of the past decade has been the creation of hospital-owned physician practices—bringing formerly independent practitioners under either the Tort Claims Act or the charitable liability portions of the Charitable Solicitation Act.

- It extends the protections of the Tort Claims Act to any government-employed physician or dentist even when they are being paid outside their salary from other funds.
- It brings under the limits of the Tort Claims Act all diagnosis and treatments paid for by “Medicaid and other publicly funded health care and medical treatment programs.”

### IS THERE A MEDICAL MALPRACTICE INSURANCE CRISIS?

Medical providers have been caught in a cost squeeze over the past several years—a squeeze driven much more by managed care than by medical malpractice insurance.

However, medical providers in South Carolina have faced sticker shock as medical malpractice premiums have increased to deal with the Patient Compensation Fund’s underfunded reserves. The PCF is a state entity which provides coverage for claims in excess of \$200,000 per claim or \$600,000 per year. Most health care providers in South Carolina are members.

Premiums in South Carolina are not especially high—an average \$18,655 compared to a national median average of \$26,873. Although that seems high, medical malpractice premiums generally constitute only about 3.5 % of a physician’s revenues. And the evidence is strong that states which have adopted caps do not have lower insurance premiums.

The number of physicians has consistently increased in South Carolina—from 5,809 in 1992 to 8,412 last year.

Advocates of medical malpractice changes routinely point to particular specialties (like obstetrics/gynecology) and rural areas of the state as affected by insurance rates. If the real problems relate to specific specialties, solutions like targeted state subsidies or tax credits make much more sense than shotgun solutions to shift the cost of injuries from malpracticing doctors and hospitals onto health care consumers.

- Although aimed at the low-income children, poor families, elderly and disabled folk who are enrolled in Medicaid—20 percent of South Carolinians, this provision as drafted would also apply to older Americans insured under Medicare, to retired military and family of active duty personnel who get care from civilian providers and to all state employees, including members of the General Assembly.
- Representatives of the Patients Compensation Fund argued that Medicaid patients are more likely to file suit for medical malpractice. We would argue that this means closer attention needs to be paid to the treatment of poor people by practitioners—not that we should cap the damages injured poor consumers should recover when malpractice by a private physician or dentist injures them. This is just a mean-spirited attack on poor people.
- Physicians are not required to take Medicaid patients. Despite their not unjustified complaints about reimbursement rates, physicians and dentists can make a good living with a Medicaid practice.

## **RACING THE CLOCK TO UNACCOUNTABILITY—STATUTE OF REPOSE/STATUTE OF LIMITATIONS**

### **DANGEROUS PRODUCTS**

Most tort actions currently have a three year statute of limitations. That means that you have three years to file suit after you discover (or should have discovered) that someone has injured you.

The proposed legislation creates a statute of repose—an outside time bar to actions based on defects or failures of products—at 6 years from date of sale. Insurers hate long statutes of limitation or repose because they have to reserve losses during the “long tail” and the risk that substantial claims will develop that were not underwritten (expected and charged for) grows. Products manufacturers prefer short limitations because it means they can move on and forget past mistakes without worrying about consequences. With products like asbestos which have long periods before the injuries show up, a 6 year statute of repose essentially eliminates liability and encourages the kinds of cover-ups of known toxic effects we saw with asbestos.

From the consumer perspective, a statute of repose entirely shifts the risk of a manufacturer’s defective product onto the consumer. The current three year statute of limitations requires a consumer to act when they discover the defect and injury but still maintains manufacturer accountability.

### **PUTTING YOUR HOME AT RISK**

For law suits based upon defective or unsafe condition of improvements to real property, there is a 13 year statute of repose. Regardless of when you discover the defective or unsafe condition, you are out of luck 13 years from the date the construction was completed. The 13 year term was a compromise reached in the mid-1980s. The construction industry now seeks to have that reduced to 6 years.

Materials manufacturers, architects, engineers and contractors bury materials and construction problems behind walls and under floors. A number of building products which have been subject of litigation, including synthetic stucco, polybuteline piping, Masonite siding and asbestos, have taken more than 6 years to manifest the problems they created.

The homeowner has practically no protection from bad construction. There is an imbalance of information and expertise. Although home inspections are becoming more common, home inspectors can’t see hidden defects. Unlike the contractors and product manufacturers, the homeowner cannot insure against bad building construction or defective materials. Homeowners will be left with no remedy after 6 years if we transfer onto them this risk from product manufacturers and contractors. It was probably a mistake to cut the statute of repose to 13 years. It would be even worse to cut it to 6 years.

## HOW DO I RECOVER DAMAGES WHEN SEVERAL PEOPLE HARM ME?--JOINT AND SEVERAL LIABILITY

When more than one person is responsible for my injuries, how do I recover? They could have acted together or their separate acts could have combined to cause a single injury. Under current South Carolina law, everyone who contributed to my injury is jointly and severally liable. That means that they are together responsible for my injuries and liable to compensate me for my damages. I do not need to prove how much each contributed to my injury. I can collect from any one of them and then it becomes their problem to [collect](#) from all the other folks whose acts combined to cause the injury.

This is sometimes called the “deep pocket” rule because the injured consumer is able to collect all of her damages from the defendant with the most assets—the deepest pocket. This ensures that injured consumers are able to recover their full damages even if other defendants are uninsured, underinsured or bankrupt.

The proposed legislation shifts onto the injured person the burdens of proving how much each of the persons responsible for her injuries was responsible and then of collecting from them individually. If any of those defendants are uninsured, underinsured or bankrupt, the injured consumer is left holding the bag. Some of those costs will be shifted onto their insurers, their employer’s insurers or society generally.

Several liability is a gift to defendants with deep pockets—big business—and more likely to shift costs to smaller defendants. In medical malpractice cases, an article in the [Physician’s News Digest](#) notes with respect to Pennsylvania’s new several liability law that: “The law’s practical impact may not be all positive for physician defendants, however, and may conceivably expose their personal assets to risk when a jury award exceeds their malpractice insurance coverage and plaintiff attorneys have nowhere else to turn for recovery.” Small businesses would have the same additional exposure.

## FRIVOLOUS LAWSUITS OR FRIVOLOUS LEGISLATION?

A centerpiece of anti-tort law is always something to prohibit “frivolous lawsuits”. South Carolina already has two formal bulwarks against “frivolous” lawsuits. First, under [Rule 11](#) of the South Carolina Rules of Civil Procedure, lawyers and parties who file a lawsuit must certify that they believe “. . . there is good ground to support it; and that it is not interposed for delay.” The court can impose sanctions under this rule “. . . which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney’s fee.” Further, the [South Carolina Frivolous Civil Proceedings Sanctions Act](#) prohibits bringing lawsuits without merit or to merely harass or injure the other party.

Lawyers take those very seriously. However, the surest bulwark against lawsuits without merit is the contingency fee system under which lawyers for injured consumers only get paid if the consumer wins the case. A lawyer who brings a bad tort case doesn’t get paid. Although lawyers may bring cases of uncertain outcome where the facts are not crystal clear or in areas where the law is developing, a lawyer who would bring a “frivolous” tort case on a contingency basis is an idiot. For all the complaining that tort reform advocates make about contingency fees, their real effect is to make lawyers for injured consumers a tight screen on lawsuits—more likely to reject meritorious cases with poor prospects or small damages than to pursue non-meritorious cases.

**“TORT REFORM” IS AN EFFORT TO SHIFT THE COSTS OF BAD BEHAVIOR—FAILING TO MEET A DUTY AND THEREBY CAUSING INJURY—FROM THE PERSON WHO CAUSES THE INJURY TO THE PERSON WHO SUFFERS THE INJURY. IT IS BAD PUBLIC POLICY BECAUSE IT LOWERS ACCOUNTABILITY FOR BAD BEHAVIOR. IT IS BAD PUBLIC POLICY BECAUSE IT CREATES FALSE ECONOMIC SIGNALS BY EXTERNALIZING REAL COSTS FROM THE BAD ACTOR WHO CAUSED THE COSTS ONTO SOCIETY. IT IS BAD PUBLIC POLICY BECAUSE IT REMOVES INCENTIVES TO PRODUCE SAFER, BETTER PRODUCTS, PRACTICE BETTER MEDICINE, BUILD BETTER BUILDINGS, DRIVE MORE SAFELY, AND PROTECT OUR ENVIRONMENT.  
IT’S JUST BAD PUBLIC POLICY.**

## **SOUTH CAROLINA FAIR SHARE POLICY PERSPECTIVES**

This is the second *South Carolina Fair Share Policy Perspectives* for 2003. The *Policy Perspectives* are an addition to our regular *Legislative Update* and *Margins of Health* which go to SCFS members.

Our intention is to explore more fully than the *Legislative Update* format allows important issues facing everyday South Carolinians. We hope to provide a better explanation of the roots of problems and creative approaches to solving them.

South Carolina Fair Share's interests and concerns are broad. This month's subject is Tort Reform. Future Perspectives will cover the variety of consumer and family issues that occupy our advocacy work.

We look to our community to assist us in preparing *Policy Perspectives*. We invite other organizations and persons working to better South Carolina to join us in producing future *Policy Perspectives*. If you have an issue that you think should be a subject of a *Policy Perspective*, please give us call.



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