Tort Reform for a Civilized Society? Implications of Tort Reform for Toxic Tort Lawsuits

Marya Rose

Recommended Citation
Marya Rose, Tort Reform for a Civilized Society? Implications of Tort Reform for Toxic Tort Lawsuits, 17 B.C. Third World L.J. 133 (1997), http://lawdigitalcommons.bc.edu/twlj/vol17/iss1/6
BOOK REVIEWS

TORT REFORM FOR A CIVILIZED SOCIETY? IMPLICATIONS OF TORT REFORM FOR TOXIC TORT LAWSUITS

MARYA ROSE*


I. INTRODUCTION

Poor people and people of color bear a disproportionate share of the United States’ environmental health hazards. This tenet is the cornerstone of the environmental justice movement. Environmental justice, an extension of both the civil rights and the environmental movements, is a broad-based legal and political movement which has developed to relieve poor, ethnic, and minority communities of the burden of toxic or hazardous waste. The movement “is premised on

* MANAGING EDITOR, BOSTON COLLEGE THIRD WORLD LAW JOURNAL. This book review is dedicated in loving memory to my aunt, Diane Rose. From the time she moved to the Niagara Falls area in the 1970s, Diane contemplated the danger of living downstream from the infamous “Love Canal” and worried about what consequences the toxic waste at that site had on her children’s health. In March of 1995 Diane was diagnosed with leukemia. It was Diane’s illness that inspired me to review A Civil Action and write this article.

1 See Sanford J. Rosen & Tom Nolan, Seeking Environmental Justice for Minorities and Poor People, TRIAL, DEC. 1994, at 50, 50 & 54 n.1 (citing UNITED CHURCH OF CHRIST COMMISSION ON RACIAL JUSTICE, TOXIC WASTE AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF THE COMMUNITIES SURROUNDING HAZARDOUS WASTE SITES (1987)). Numerous studies have confirmed that poor minority communities bear a disproportionate burden of pollution. See Allan Kanner, Environmental Justice, Torts and Causation, 34 WASHBURN L.J. 505, 505-06 (1995). According to the Environmental Protection Agency (EPA), polluting industries and hazardous waste dumps are most often located in predominately low-income, minority communities. See id.

2 See Rosen & Nolan, supra note 1, at 50.

3 See Bradford C. Mank, Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation, 56 OHIO ST. L.J. 329, 329 n.1 (1995); Rosen & Nolan, supra note 1, at 50; Rhona J. Kisch, Book Note, Putting Environmental Racism on the National Agenda, 133
the notion that the rights of toxic contamination victims have been systematically usurped by more powerful social actors, and that 'justice' resides in the return of those rights."

Environmental justice, then, requires an ability to vindicate claims for personal injury and property damage, especially where the claims arise from the proximity of poor or minority communities to hazardous facilities. Private toxic tort lawsuits provide one way to achieve this vindication. Toxic torts involve claims for actual or potential physical injuries, emotional distress, property damages, and economic losses caused by toxic substances in the air, ground, or water. Toxic torts are often complex mass torts that involve multiple defendants and large classes of victims. Many toxic tort cases are brought as class action suits by lawyers working on a contingency fee basis. The invisibility of many of the injuries and the relative indivisibility of harm from hazardous pollution often make joint and several liability a particularly attractive scheme of liability. Additionally, because toxic tort cases are so complex, they tend to be incredibly expensive to litigate. For these rea-

A Review of Race and the Incidence of Environmental Hazards: A Time for Discourse, 24 Envtl. L. 1171, 1181 (1994). Environmental justice has also emerged as part of the agenda of civil rights groups and civic organizations, in law school curricula, and as the subject of studies by the EPA. See Kanner, supra note 1, at 505.


5 See Kanner, supra note 1, at 506-07.


7 "Toxic substances are any chemical, biological, biochemical or radioactive materials that cause an immediate or long-term harm to people, animals or the environment." Allan T. Slagel, Note, Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims, 63 Ind. L.J. 849, 849 n.1 (1988).


11 See Jean Macchiarioli Eggen, Understanding State Contribution Laws and their Effect on the Settlement of Mass Tort Actions, 75 Tex. L. Rev. 1701, 1718 n.74 (1995). When several hazardous substances from different sources blend at one site, determining the percentage of fault of the various polluters may be nearly impossible. See id. Additionally, when an "invisible" injury does not manifest itself until years after exposure, as is often the case in asbestos litigation, it is difficult to pinpoint which source caused the harm at which time. See id. at 1745-46 n.247. In such cases, not using joint and several liability would be impractical. See id.

sons, toxic tort cases are especially vulnerable to many federal and state tort reform measures that limit class actions, contingency fee arrangements, awards of damages, and the use of joint and several liability.\textsuperscript{13} Environmental justice is often pursued through toxic tort suits,\textsuperscript{14} and is therefore particularly threatened by tort reform.

In \textit{A Civil Action}, Jonathan Harr provides a window through which to view the potential injustice of tort reform’s effects on the poor and minority groups.\textsuperscript{15} Harr, a journalist who had written for the \textit{New England Monthly} and the \textit{New Haven Advocate}, was given the idea for \textit{A Civil Action}, his first book, by his friend and mentor, the writer Tracy Kidder.\textsuperscript{16} Kidder had heard about a toxic tort lawsuit in Woburn, Massachusetts, from one of the plaintiffs’ lawyers.\textsuperscript{17} Harr took the suggestion from Kidder, but decided not to focus on the plaintiffs themselves. Harr explained, “I knew I didn’t want to write a book about toxic waste and dead children [because a history of a lawsuit would be] tedious and dull. I wanted to write about lawyers and the law, about people and how they work.”\textsuperscript{18}

As a result, \textit{A Civil Action} is the narrative account of a lawyer’s involvement with a toxic tort suit, a suit brought by the families of children in Woburn who contracted leukemia in the 1970s.\textsuperscript{19} The book is more, however, than a simple narrative. It serves as a warning against the call for tort reform that is sweeping our nation.\textsuperscript{20} Through the events chronicled in \textit{A Civil Action}, Harr exposes the dangers of tort reform to socio-economically disadvantaged people who are injured and who seek environmental justice through toxic tort suits.

Part II of this Book Review begins by describing the suit brought by the Woburn families. Part III outlines the particular danger to toxic tort victims that is posed by tort reforms that limit class actions. Part IV examines the impact of reforms that modify the financial aspects of

\textsuperscript{13} See infra parts III, IV, and V (discussion of proposed and enacted reforms).
\textsuperscript{14} See Duncan, supra note 6, at 355.
\textsuperscript{15} See generally Jonathan Harr, \textit{A Civil Action} (1995).
\textsuperscript{18} Id.
\textsuperscript{19} See generally Harr, supra note 15.
\textsuperscript{20} See Martha Middleton, \textit{A Changing Landscape: As Congress Struggles to Rewrite the Nation’s Tort Laws, the States Already May Have Done the Job}, A.B.A. J., Aug. 1995, at 56, 57. Besides federal legislation, state legislatures took up more than seventy new tort law bills in their 1995 sessions. See \textit{id}. The many proponents of tort reform believe that the tort system must be overhauled to stop a litigation explosion that “has led to million-dollar judgments by irresponsible juries that judges will not control,” and that has eroded the competitive edge of American business in the international marketplace. See \textit{id} at 58.
toxic tort suits. These reforms include caps on non-economic damages, caps on punitive damages, "loser pays" provisions, and limits on contingency fee arrangements. Finally, Part V addresses proposals to modify or abolish joint and several liability and the effect of such proposals on toxic tort suits brought by poor or minority victims.

II. THE LAWSUIT

The events surrounding the Woburn case are not unusual for a toxic tort suit. The case began when a boy named Jimmy Anderson developed childhood leukemia in 1972. His mother, Anne Anderson, discovered that a dozen children in her neighborhood had leukemia, a number she later learned was at least seven times the national average. In 1979, the two public wells that supplied drinking water to the neighborhood were found to be contaminated with highly toxic industrial solvents. Mrs. Anderson suspected a connection between the contaminated drinking water and the high rate of leukemia, but public health officials were unable to find a causal connection between the water and the disease. Mrs. Anderson and four other families decided to meet with a lawyer to "see what the possibilities were." Eventually, they and three more families hired a personal injury lawyer, Jan Schlictmann, on a contingency fee basis.

In 1982, the families filed suit against two corporations, W. R. Grace and Beatrice Foods, accusing them of polluting Woburn's water supply, and causing death and injury to their children. The complaint alleged that subsidiaries of Grace and Beatrice had poisoned the drinking water in Woburn with toxic chemicals including trichloroethylene (TCE). The poisoned water, according to the complaint, caused a cluster of leukemia, the deaths of five children, and injuries to all the family members who were party to the suit. In addition to demanding

\[23\] See id. at 40, 50. In 1981, the United States Centers for Disease Control and Prevention (CDC) and the Massachusetts Department of Public Health jointly released a report analyzing the increased incidence of childhood leukemia in the Andersons' neighborhood in Woburn. See id. at 49-50.
\[24\] See id. at 36.
\[25\] See id. at 21.
\[26\] See id. at 50.
\[27\] Id. at 47.
\[28\] See id. at 47-48, 67, 102, 149, 441-42.
\[29\] See id. at 81.
\[30\] See id.
\[31\] See id.
compensation for the injuries to the children, the families demanded compensation for an increased risk of contracting leukemia, liver disease, central nervous system disorders, and other cancers and illnesses. The families also demanded punitive damages for the "willful" and "grossly negligent" acts of the defendants.

The case was assigned to Judge Walter Jay Skinner, who bifurcated the trial. Under Skinner's trial model, the first stage of trial would address the issue of whether Beatrice and Grace were responsible for contaminating the wells. Then, if the jury found the defendants liable, the second stage would deal with the issue of whether the chemicals had caused any of the injuries.

At the end of the first stage of the trial, Skinner presented the jury with four questions: 1) "Had the plaintiffs established by a preponderance of the evidence that any of the following chemicals—TCE, perc, and 1, 2 transdichloroethylene—were disposed on the Beatrice land after August 27, 1968 (in the case of W.R. Grace, after October 1, 1964, the date Well G had opened), and had these chemicals substantially contributed to the contamination of the wells before May 22, 1979?"; 2) "What, according to a preponderance of the evidence, was the earliest date—both the month and year—at which each of these chemicals had substantially contributed to the contamination of the wells?"; 3) "Had this happened because of the defendants' failure to fulfill any duty of care due to the plaintiffs?"; and 4) "What, according to a preponderance of the evidence, was the earliest time (again, both the month and year) at which the substantial contribution referred to in question 3 was caused by the negligent conduct of this defendant?"

On the first question the jury determined that Grace had contaminated the wells, but that Beatrice had not. Thus, Beatrice was absolved of liability. The jury answered the second question on the date of contamination "Not Determined," the third question regarding whether the defendants had been negligent "Yes," and the fourth question asking for the date the negligence caused the contamination "Septem-

32 See id.
33 See id.
34 See id. at 105, 286–87.
35 See id. at 286–87.
36 See id.
37 Id. at 368–69.
38 See id. at 391.
39 See id.
ber 1973. Instead of proceeding to the second stage of the trial, Grace settled for $8 million.

The settlement money was divided between the families, the case expenses, and lawyers’ fees. Each of the eight plaintiff families received $455,000. Another $2.6 million covered case expenses. Schlictmann’s firm received $2.2 million in fees, which was twenty-eight percent of the total settlement—an amount much lower than the forty-percent fee to which the families had originally agreed. The money went toward the salaries, benefits, and bonuses of the secretaries, associates, partners, and paralegals; a $350,000 referral fee to the lawyer originally contacted by the Woburn families; a $300,000 fee for the assistance of the Trial Lawyers for Public Justice; and a $1 million loan from the Bank of Boston. Schlictmann ended up with only $30,000. He owed his creditors $1,231,542.

Schlictmann attempted to appeal the case against Beatrice in vain. His petition for a rehearing at the United States Court of Appeals for the First Circuit was denied, as was his request for a writ of certiorari in the United States Supreme Court.

III. THE LEGAL ATTACK ON CLASS ACTIONS

Jonathan Harr may never have had a case to write about if the families in Woburn had not been able to file a class action suit. Through the class action device, all toxic tort victims can join together into a single lawsuit. In a typical class action suit, a large class of persons

40 See id. at 391–92.
41 See id. at 451.
42 Id. at 453.
43 See id.
44 See id. For example, Schlictmann spent $88,729 for the services of a specialist in occupational and environmental medicine who reported on the differences in the families’ health before and after the opening of the polluted wells. See id. at 200–01. A cardiologist from the Boston University School of Medicine charged $55,762 for a report on the plaintiffs’ irregular heartbeats. See id. at 202–03. Schlictmann ordered a geological investigation of the area surrounding the wells which cost more than $500,000 and a $19,021 video of that investigation. See id. at 209, 263. Aerial photographs of Woburn and an expert on aerial photography interpretation cost Schlictmann almost $15,000. See id. at 209–10. Interest on the debt Schlictmann owed to his creditors amounted to several hundred dollars per day. See id. at 263.
45 See id. at 453.
46 See id. at 454–55.
47 See id. at 455.
48 See id. at 491.
49 See id. at 488–89.
50 See id. at 488.
51 See id. at 488–89.
52 See PLATER, supra note 9, at 173.
who are similarly situated in regard to the case are represented by either a small group or a single member of the class.\textsuperscript{53} Toxic torts are frequently ideal for joined litigation because they often involve "mass torts" in which large numbers of individuals are injured through the same pattern of events.\textsuperscript{54} In fact, the majority of environmental cases are filed as class action suits.\textsuperscript{55} One reason that environmental cases are often filed as class actions is that joinder of parties and joinder of claims enable plaintiffs in expensive cases to pool their resources with those of other plaintiffs facing the same problem.\textsuperscript{56} Additionally, judicial efficiency is better served by joined or class actions.\textsuperscript{57} When only one lawsuit is filed on behalf of all the victims of the pollution, the basic underlying facts are resolved only once, which reduces the court's workload.\textsuperscript{58}

Although the only current federal reform that expressly restricts class actions applies solely to shareholder suits,\textsuperscript{59} less overt reforms have been successful in limiting the use of class actions by poor and minority people. The most obvious example of this trend is the attempt by the 104th Congress to eradicate the Legal Services Corporation.\textsuperscript{60} While the Legal Services Corporation was not totally eliminated, an amendment to a spending bill now bars Legal Services lawyers from taking cases involving class actions.\textsuperscript{61} Second, rules against aggregating disputed sums in order to meet minimum diversity requirements in federal court have discouraged the use of class actions.\textsuperscript{62} These rules function to reduce court access\textsuperscript{63} of plaintiffs from diverse jurisdictions who have individually small injuries, but collectively large ones. A third

\textsuperscript{53} See id.
\textsuperscript{54} See id.
\textsuperscript{56} See Plater, supra note 9, at 172.
\textsuperscript{57} See id. at 173.
\textsuperscript{58} See id.
\textsuperscript{59} See Status of Major Legislation: 104th Congress, 53 CONG. Q., 3234, 3236 (1995). A typical shareholder lawsuit arises when the value of a company's stock drops precipitously. Disgruntled investors then sue the company, alleging that they were improperly lured into buying stock by misleading claims about future earnings and by the withholding of vital financial information. See id. In March 1995, the United States House of Representatives passed H.R. 1058, which would limit suits by investors against companies. See Status of Major Legislation: 104th Congress, 54 CONG. Q., 74, 76 (1996). The United States Senate passed the provision in June of 1995. See id. President Clinton's veto of the measure was overridden in December of that year. See id.
\textsuperscript{60} See Federal Legal Aid Agency Survives Bid to End It, BOSTON GLOBE, Sept. 30, 1995, at 9.
\textsuperscript{61} See id.
\textsuperscript{63} See id. at 831.
attack on the use of class actions is embodied in distribution of awards.\textsuperscript{64} For example, in a recent California case, a superior court judge allowed a defendant to keep all the money that went unclaimed by members of the injured class, instead of requiring the unclaimed property to be turned over to the state as directed by statute.\textsuperscript{65} Actions such as this dramatically shrink\textsuperscript{66} the total award from which plaintiffs’ attorneys may draw their contingency fees, thus further discouraging lawyers from bringing class action suits.\textsuperscript{67}

The viability of class actions is crucial to the success of toxic tort suits brought by poor plaintiffs. Without class actions, the first plaintiffs to bring suit may be the only ones to collect substantial punitive damages awards, an outcome which would affect the ability of other, equally deserving plaintiffs to recover for their injuries.\textsuperscript{68} The risk that a “first come, first serve” model of distribution will deplete a finite pool of award money is illustrated in New Jersey, where the United States District Court for the District of New Jersey held that under the Due Process Clause of the Fourteenth Amendment, it is unfair to subject defendants to the possibility of multiple punitive damages awards for a single course of conduct.\textsuperscript{69} More fundamentally, when injury to a client is not extensive, the nominal damages potentially available to that client may not justify the extensive legal work required to litigate a toxic tort claim.\textsuperscript{70} Realistically, a class action may be the only way to economically justify the litigation.\textsuperscript{71}

For Anne Anderson and the other plaintiffs in the Woburn case, the availability of class action status was critical for success. If the plaintiffs had each been forced to bring separate suits and had not chosen to settle, Judge Skinner could have awarded punitive damages only to the first plaintiff.\textsuperscript{72} Additionally, the amount of potential damages to one of the families, as opposed to all of the families in the


\textsuperscript{65} See id.

\textsuperscript{66} See id. In the typical class action only about fifteen percent of the potential class members come forward. See id.

\textsuperscript{67} See id.


\textsuperscript{70} See Peter F. Langrock, Environmental Law: Class Action Litigation, TRIAL, Oct. 1989, at 46, 47.

\textsuperscript{71} See id. at 48.

\textsuperscript{72} See Slap & Milstein, supra note 68, at 86.
aggregate, probably would not have attracted any lawyer to the case. Finally, not being able to pool either existing resources or anticipated recoveries would have precluded the families from funding the studies and hiring the experts they needed in order to prove complicated causation issues.

IV. MONETARY ATTACKS

In addition to reforms of class action suits, Congress and many state legislatures have passed laws that affect the financial aspects of toxic tort suits. Three common reforms are caps on non-economic and punitive damages, "loser pays" provisions, and limitations on contingency fee arrangements.

A. Caps on Non-Economic and Punitive Damages

A statutorily imposed cap on non-economic or punitive damages is one monetary-based reform that would have gravely affected the progress of the Woburn case. Fortunately for Anne Anderson and her neighbors, no such legislation was in place in 1982 when they filed suit against Beatrice and Grace.

In March of 1995, the United States House of Representatives passed the Common Sense Legal Reform Act, a three-pronged package of tort reform bills designed to curb civil litigation. The United State Senate passed two prongs of the Act, one of which has become law, and the other of which was successfully vetoed by President Clinton. The segment of the Act specifically dealing with civil litigation was placed on the Senate calendar on March 15, 1995, but no action has since taken place. The civil litigation provision would apply to all

---

73 See Langrock, supra note 70, at 47, 48.
74 See supra note 44 (discussion of case expenses).
75 See Middleton, supra note 20, at 57.
76 See id.
77 See David Masci, Broad Changes Pass House, Face Harder Sell in Senate, 53 CONG. Q., 744, 744 (1995); Mac Collins, Promises Made, Promise Kept, Contract with America, Gov't Press Releases, Apr. 10, 1995, available in 1995 WL 14248093. The three parts of the Act are H.R. 956, the Product and Legal Reform Act; H.R. 988, the Attorney Accountability Act; and H.R. 1058, the Securities Litigation Reform Act. See Masci, supra at 744; Collins, supra.
78 See Masci, supra note 77, at 744.
lawsuits in tort and would limit punitive damages to three times the amount of economic damages or $250,000, whichever is greater.\textsuperscript{81}

The states are not waiting for federal reforms to take effect. According to the American Tort Reform Association of Washington, D.C., eighteen states\textsuperscript{82} have capped non-economic damages and thirty-one states\textsuperscript{83} have implemented reform of punitive damages, either by capping them, prohibiting them, or limiting them to findings of clear and convincing evidence.\textsuperscript{84} Several of these states acted as recently as 1995 to limit non-economic and punitive damages,\textsuperscript{85} and two states enacted legislation in 1996.\textsuperscript{86}

\textsuperscript{81} See Anderson, supra note 55, at S14; Middleton, supra note 20, at 59; Tortologies, The Economist, Mar. 11, 1995, at 26.

\textsuperscript{82} See American Tort Reform Association, 1996 Tort Reform Enactments 3 (1996) [hereinafter Tort Reform Enactments]; Middleton, supra note 20, at 59. The states which have capped non-economic damages in some form are Alaska, California, Colorado, Florida, Hawaii, Idaho, Illinois, Kansas, Maryland, Michigan, Missouri, Montana, North Dakota, Ohio, Oregon, Utah, West Virginia, and Wisconsin. See Tort Reform Enactments, supra, at 3; Middleton, supra note 20, at 59.

\textsuperscript{83} See Tort Reform Enactments, supra note 82, at 3; Middleton, supra note 20, at 59. The states which have implemented reforms of punitive damages are Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin. See Tort Reform Enactments, supra note 82, at 3; Middleton, supra note 20, at 59.

\textsuperscript{84} See Middleton, supra note 20, at 59.

\textsuperscript{85} See Eleanor N. Bradley, State Reform of Tort Laws Proceeds During Calls for Federal Intervention, U.S. L. Wk.—Daily Edition, May 24, 1995, available in LEXIS, BNA Library, U.S. Law Week Daily File. In March of 1995, Illinois enacted a law capping awards for non-economic damages at $500,000, and capping punitive damages at three times economic damages. See id. Texas enacted a law in April 1995 capping punitive damages awards at the greater of $200,000 or two times economic damages plus an amount equal to any non-economic damages up to $750,000. See id. A bill effective in Indiana since July 1995 caps punitive damages in civil lawsuits at three times compensatory damages or $50,000, whichever is greater. See id. Only twenty-five percent of any punitive damages award goes to the plaintiff, with the remainder applied to a compensation fund for victims of crime. See id. In May 1995, New Jersey enacted a cap on punitive damages of $350,000 or five times the amount of compensatory damages, whichever is greater. See id. New Jersey also limits punitive damages awards to instances where the plaintiff proves by "clear and convincing evidence" that the defendant showed "actual malice" or wanton and willful disregard for the resulting or potential harm. See id.

\textsuperscript{86} See Tort Reform Enactments, supra note 82, at 2, 3–4. Louisiana repealed the statute which authorized punitive damages to be awarded for wrongful handling of hazardous substances. See id. at 2. Ohio limited the amount of punitive damages recoverable from all parties except large employers to the lesser of three times the amount of compensatory damages or $100,000, and limited the amount of punitive damages recoverable from large employers to the greater of three times the amount of compensatory damages or $250,000. See id. at 3. Ohio also limited non-economic damages to the greater of $250,000 or three times the amount of economic damages, to a maximum of $500,000. See id. at 4. If certain permanent physical injuries are present,
Limiting non-economic damages will have a negative effect on toxic tort cases. Many victims of hazardous waste dumping are poor. Limiting non-economic damages will have a negative effect on toxic tort cases. Many victims of hazardous waste dumping are poor. People who are unemployed or have low incomes can prove only minimal economic damages, if any. Because they cannot prove significant economic damages, the bulk of their pecuniary awards come from non-economic damages, such as emotional damages. These potential plaintiffs are thus less attractive clients to lawyers working on a contingency fee basis when non-economic awards are limited by tort reform measures.

Similarly, capping or limiting punitive damages also has a chilling effect on the advancement of toxic tort cases. Because toxic tort cases involve high levels of complexity, difficulty, and expense, the availability of punitive damages remains an important incentive for attorneys to take these cases. Additionally, some victims depend on punitive damages to cover losses that are not considered in trial, such as illnesses that turn up in children of injured mothers. The New Jersey Supreme Court elaborated on this use of punitive damages awards when it declared, "[O]ne of the underlying unwritten premises of awarding punitive damages is that plaintiffs are often under-compensated by compensatory damages. Expenses of litigation, counsel fees, and expert fees are extremely high and burden plaintiffs."

Limiting punitive damages does not correspond to the concept of punishment that is the foundation of the doctrine. Capping punitive damages, requiring the amount of punitive damages to correspond to the amount of compensatory damages, or restricting punitive damages to a multiple of the compensatory award is illogical in toxic tort cases because sometimes, even egregious conduct will only yield slight compensatory damages. Additionally, by "raising the standard of proof for punitive damages to conduct that is either intentional or reveals a 'conscious, flagrant indifference' to the rights or safety of others," a

however, Ohio limits non-economic damages to the greater of $1 million or $35,000 times the number of years remaining in the plaintiff's expected life. See id.

87 See Rosen & Nolan, supra note 1, at 50.
89 See id.
90 See Slap & Milstein, supra note 68, at 91.
91 See Ross Ramsey, Victims Fear Tort Reform Laws Will Take Away Rights, HOUS. CHRON., Feb. 4, 1995, at A26. This particular concern was articulated by Gail Armstrong, the founder of the National Breast Implant Coalition. See id.
93 See Slap & Milstein, supra note 68, at 85.
defendant could be released from liability for acts that are reckless or that result from gross negligence. Thus, some egregious conduct would not be compensable at all. Finally, the general absurdity of capping or otherwise legislating a set amount for punitive damages has been appreciated for well over a century. In 1852, the Supreme Court stated that determining the amount of punitive damages "has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." If their case had not settled, the Woburn families would have needed an award of non-economic damages, punitive damages, or both to be fully compensated for their loss. First, hospital bills did not reflect the pain and suffering felt by the families of the sick and dying children. Second, at the time of the suit, the plaintiffs did not know if any more of their family members would fall ill as a result of Grace’s and Beatrice’s dumping of contaminants. Punitive damages awards could have been used to defray the costs of those unknown future illnesses. Finally, the simple fact that they would have only been able to prove a small amount of economic damages would have made them unattractive clients for Schlictmann, who needed a large recovery to offset his expenses.

B. "Loser Pays"

Another financially-aimed reform that seriously hampers class action toxic tort suits is the "loser pays" arrangement, whereby the "losing" party pays for the "winner’s" legal fees. Such a provision, had it been in place at the time, would have greatly increased the risks of litigation for the Woburn plaintiffs.

As part of the Common Sense Legal Reform Act, in March of 1995 the United States House of Representatives passed the Attorney Accountability Act, a bill which includes a proposal popularly known as the "loser pays" proposal, or "English rule." The Attorney Account-

---

98 See Ramsey, supra note 91, at A26.
99 See Duncan, supra note 88, at 66.
101 See Tortologies, supra note 81, at 26. The "loser pays" provision is also known as the "English rule" because the English rule of costs forces losers in certain cases to pay the winners' legal fees. See id.
ability Act was placed on the Senate calendar in March of 1995, but no further action has been taken.102 The “loser pays” measure would apply to diversity cases brought in federal court and require that the party who rejects a settlement offer pay at least a portion of the other party’s legal costs if the damages awarded at trial are lower than the amount of the rejected offer.103 The “loser” would be required to pay even if she or he actually won the case but was awarded a sum smaller than the other party’s last offer.104 The amount the “loser” must pay would be limited to an amount no greater than the “loser’s” own legal fees and would only cover fees incurred after the last settlement offer.105

At the state level, only Indiana currently has a “loser pays” rule.106 Indiana’s rule provides that a party rejecting a settlement offer is liable for up to $1000 of the opposing side’s legal fees and costs if the award at trial is less than the rejected settlement offer.107 At least one proponent of the Indiana law, which has been effective since July 1995, originally wanted it to be stricter, with a potential obligation of $5000.108

The “loser pays” proposal would have an adverse impact on toxic tort suits. According to Merrill Davidoff, an attorney with the Philadelphia firm Berger & Montague, a plaintiff with a meritorious case could still lose if she or he could not prove all of her or his claims, and would thus be leery of initiating litigation.109 Additionally, Davidoff maintains that “if the loser pays for every lawsuit, anyone who is not wealthy would be dissuaded from filing.”110 Phillip H. Corboy, Chair of the American Bar Association Special Committee on Medical Professional Liability, notes that a defendant would be entitled to have the plaintiff pay its attorney fees even if that defendant wrongfully harmed the plaintiff, as long as the verdict is lower than the defendant’s last offer.111 Consumer groups and the American Bar Association also oppose the “loser pays” proposal because it would deny legal access to citizens who, despite having serious legal complaints, cannot risk having to pay their

103 See Anderson, supra note 55, at S14; Middleton, supra note 20, at 59; Tortologies, supra note 81, at 26.
104 See Tortologies, supra note 81, at 26.
105 See Anderson, supra note 55, at S14; Tortologies, supra note 81, at 26.
107 See id.
108 See Bradley, supra note 85.
109 See Anderson, supra note 55, at S14.
110 Id.
111 See Middleton, supra note 20, at 59.
opponents’ legal costs if they lose. The United States Supreme Court has recognized the injustice of the “loser pays” arrangement. In 1967, Chief Justice Earl Warren warned that “[s]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.” According to G. Marc Whitehead, chair emeritus of Popham, Haik, Schnobrich & Kaufman in Minneapolis, even the English recognize the injustice in their “loser pays” system. While legislatures in the United States have been limiting access to the court system, he reports, England is preparing to adopt a contingent fee system “because they do not believe you can achieve civil justice, changes in unsafe products, safe workplaces, a clean environment, without an American-style contingent fee system where people have access to the courts.”

Jonathan Harr also criticizes the proposal, since a poor plaintiff, or even one of modest income, would face far worse odds against a rich defendant under the “loser pays” scheme. As Harr explains, “Corporations can afford to take the risk, but for someone already suffering an injury or loss, the provision makes the act of entering a courtroom more like a double-or-nothing bet at a poker table.” Anne Anderson and the other plaintiffs in the Woburn case present the perfect example of Harr’s concern. None of the families came close to being wealthy. Certainly, if they had turned down Grace’s settlement offer, and if Grace had prevailed at trial, they could not have afforded Grace’s $7 million legal fees. In fact, if they had been subject to a “loser pays” provision, the plaintiffs would have had to pay millions for Beatrice’s fees because Schlictmann had refused Beatrice’s $1 million settlement offer and Beatrice was later absolved of liability. Neither

112 See Bad Justice, supra note 100, at A18.
113 See Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).
114 Id.
116 Id.
118 Id. In a double-or-nothing poker bet, a player bets twice as much as was previously bet and lost. See ALBERT H. MOREHEAD ET AL., THE NEW COMPLETE HOYLE REVISED 679 (1991). In Harr’s analogy, a plaintiff “bets” the cost of both parties’ legal fees in addition to the amount already lost as a result of an injury. See Harr, supra note 117, at A19.
119 See Harr, supra note 15, at 454.
120 See id. at 230–31, 286, 391, 454. At one point, Beatrice’s lawyer, Jerome Facher, may have offered Schlictmann $20 million, and Schlictmann may have turned it down. See id. at 231.

Facher was exasperated. “I don’t understand why you won’t give me a number,
the families nor Schlictmann could afford to take such a risk. Had they faced a “loser pays” provision, they may never have filed suit, or may have settled early for an amount far less than their damages.

C. Contingency Fees

Limiting the availability of contingency fee arrangements is an additional financially-based reform that poses a grave threat to plaintiffs like those in the Woburn case. No such reform was in place, however, when the Woburn families filed suit against Beatrice and Grace.

The Manhattan Institute, a conservative public-policy research organization funded by “corporate heavyweights,”121 recently circulated a proposal to significantly revise standard contingency fee schedules.122 While the proposal does not call for an end to contingency fees,123 it would prohibit charging contingency fees against settlement offers made before a plaintiff’s retention of counsel or when a settlement offer is accepted within sixty days of a plaintiff’s notice of a suit.124 If a plaintiff rejects a defendant’s offer, her or his lawyer’s fee “is the bargained for contingent fee rate applied to the excess over the rejected early offer plus an hourly rate fee for the recovery up to the amount of the early offer.”125 The proposal does not contemplate altering contingency fees in cases where there is no offer within sixty days.126

any goddamn number.” He reached into his hip pocket, pulled out his wallet, and slapped a twenty-dollar bill on his desk. He leaned back in his chair. “What if I put six zeros on the end of that. Would you take it?”
Twenty million dollars.
Schlictmann laughed but did not answer Facher’s question.

Id.

123 See Foppert, supra note 121, at 38–39.
124 See Brickman, supra note 122, at 5.
125 Id.
126 See id.
Proposals similar to the Manhattan Institute’s have been circulating for at least a decade.\textsuperscript{127} In the mid-eighties, an alliance of insurance companies, governments, and manufacturers proposed lowering the maximum contingency fee a plaintiff’s lawyer could charge.\textsuperscript{128} The executive branch of the United States government has also proposed to alter contingency fee arrangements.\textsuperscript{129} Ronald Reagan’s administration sought to substitute a steep sliding scale in place of a set percentage for contingency fees, allowing lawyers to claim, for example, twenty-five percent of the first $100,000 of a plaintiff’s award or settlement, but only ten percent for amounts above $300,000.\textsuperscript{130}

The continued availability of the contingency fee arrangement is integral to poor plaintiffs’ quest for justice in the courts. Philip H. Corboy, Chair of the American Bar Association Special Committee on Medical Professional Liability, points out that precisely because a potential plaintiff is injured, she or he is less likely than at any other time to be able to afford hourly fees.\textsuperscript{131} Additionally, he notes that because a well-prepared trial can be very expensive, almost every plaintiff is “indigent” when it comes to paying the full cost of quality trial advocacy.\textsuperscript{132} This is especially true when compared to the wealthy corporations that many toxic tort victims sue. Not only do corporations have the money for top-of-the-line legal defense, but their lawyers’ legal fees are also not currently subject to any tort reform proposals.\textsuperscript{133} More fundamentally, simply finding a lawyer to take a mass toxic tort suit would be more difficult without the possibility of paying through a contingency fee.\textsuperscript{134} When contingency fees are limited, lawyers are disinclined to take cases, even when they are strong.\textsuperscript{135} Even if the only limitation on the fee were a sliding scale, lawyers would be less inclined to take risks on large recoveries, such as those in many toxic tort class actions.\textsuperscript{136}

\textsuperscript{128} See \textit{id.} at 41.
\textsuperscript{129} See \textit{id.}
\textsuperscript{130} See \textit{id.}
\textsuperscript{131} See Foppert, \textit{supra} note 121, at 42.
\textsuperscript{132} See \textit{id.}
\textsuperscript{133} See Gillers, \textit{supra} note 127, at 41.
\textsuperscript{134} See \textit{id.}
\textsuperscript{135} See \textit{id.}
\textsuperscript{136} See \textit{id.} Limits based on a sliding scale may pose their own risk of exacerbating the conflict of interest which is inherent in the contingent fee arrangement. See Richard M. Birnholz, Comment, \textit{The Validity and Propriety of Contingent Fee Controls}, 37 U.C.L.A. L. REV. 949, 980–81 (1990). At some point along the sliding scale, the lawyer’s “marginal return per add hour” will
The plaintiffs in the Woburn case would have been severely affected by a limitation on contingency fee arrangements. Their case expenses amounted to $2.6 million, and Schlictmann’s legal fees came to another $2.2 million. Although not destitute, the families certainly did not have funds to pay these kinds of expenses. From the time suit was filed to the denial of certiorari by the Supreme Court, Schlictmann spent eight years on the case. If Schlictmann had been hired on an hourly fee basis, his bill would have been astronomical. Even if the plaintiffs had been able to hire Schlictmann on a contingency fee basis, the plaintiffs would have been disadvantaged if that arrangement had been limited in some fashion. It is not likely that Schlictmann or any other lawyer would have taken such a risky case if her or his potential recovery were not substantial. A limitation on contingency fees would have effectively barred the Woburn families from ever bringing suit.

V. The Attack on Joint and Several Liability

Joint and several liability is another common target of reform proposals that affect toxic tort suits brought by poor plaintiffs. Tort law employs the doctrine of joint and several liability when one or more parties’ actions converge and cause a single, indivisible injury to a plaintiff. Under this doctrine, each defendant is potentially liable for the entire damages award, even though each one’s individual contribution to the harm is less than one hundred percent. If one defendant is judgment proof and its share of the judgment is not collectible, the remaining defendants must assume responsibility for the entire judgment award, even if they were only minimally at fault.

Reforms of joint and several liability have been proposed and implemented on many fronts. At the federal level, a provision of the House version of the Common Sense Legal Reform Act would have eliminated joint and several liability for non-economic damages in all tort lawsuits, including those filed in state courts. President Clinton fall below her or his “marginal cost,” which may cause the lawyer to not exert the effort necessary to maximize the client’s net recovery. See id.

See Harr, supra note 15, at 453.
See id. at 81, 487–89.
See Plater, supra note 9, at 176.
See Mike Steenson, Recent Legislative Responses to the Rule of Joint and Several Liability, 23 Tort & Ins. L.J. 482, 482 (1988) (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 47 (5th ed. 1984)).
See id.
See Anderson, supra note 55, at S14; Middleton, supra note 20, at 59.
successfully vetoed the conference version of that bill, which would have abolished joint and several liability for non-economic losses only in product liability suits. The states, on the other hand, have been successful in their efforts to modify joint and several liability. In the mid-1980s, about half the states enacted legislation to alter traditional joint and several liability. According to the American Tort Reform Association of Washington, D.C., forty-two states have modified or abolished joint and several liability since 1986. To date, only eight states have abstained from reforming joint and several liability.

Several of the forty-two states that have modified or abolished joint and several liability were active in this area of tort reform as recently as 1995. In Texas, legislation effective September 1, 1995, altered joint and several liability by making a defendant liable for all damages only if the defendant is at least fifty-one percent liable for an injury. In toxic tort cases the threshold is fifteen percent. Previously, Texas’s levels for liability were one percent for toxic torts and ten percent in all other torts. Proponents of tort reform in Texas’s 1995 legislative session sought to abolish joint and several liability entirely, while opponents fought to keep the “environmental exception.” A compromise was offered at fifteen percent, and the Texas legislature finally agreed on that percentage. Another state that acted recently is Illinois, which totally eliminated the concept of joint and several liability.

144 See Phillips, supra, note 94, at 107.
145 See American Tort Reform Association, Tort Reform Record 7 (1996) [hereinafter Tort Reform Record]; Middleton, supra note 20, at 59.
146 See Tort Reform Record, supra note 145, at 7; Middleton, supra note 20, at 59. The states that have not reformed joint and several liability are Arkansas, Maine, Maryland, Massachusetts, North Carolina, Pennsylvania, Rhode Island, and West Virginia. See Tort Reform Record, supra note 145, at 7; Middleton, supra note 20, at 59. However, that list may shrink soon: as of August 1995, limits on joint and several liability were being considered in Pennsylvania. See Anderson, supra note 55, at S14.
148 See Reality of Tort Reform, supra note 147, at 1; Package Deal, supra note 147, at 11, Courtney, supra note 147, at 26.
149 See Reality of Tort Reform, supra note 147, at 1.
150 See Courtney, supra note 147, at 26.
151 See id.
in March 1995.\textsuperscript{152} Two months later, Wisconsin adopted a law limiting joint and several liability.\textsuperscript{153} Under Wisconsin's old provision, defendants in a tort case would only have to be found one percent liable for a plaintiff's injuries before they would be liable to pay the entire damages award.\textsuperscript{154} The new law changes the threshold for liability to fifty-one percent.\textsuperscript{155}

Louisiana and Ohio both enacted reforms of joint and several liability in 1996.\textsuperscript{156} Louisiana's law abolishes joint and several liability in all civil actions, leaving defendants liable only for damages proportional to their assigned degrees of fault.\textsuperscript{157} Ohio abolished joint and several liability with one exception.\textsuperscript{158} Under Ohio's law, defendants who are more than fifty percent at fault are jointly liable for economic damages only.\textsuperscript{159}

Toxic torts are not always included in reforms of joint and several liability. Some states, including Arizona, Idaho, Illinois, Minnesota, Nevada, New Jersey, New York, Oregon, Texas, and Washington, have recognized that joint and several liability is central to the success of toxic tort suits.\textsuperscript{160} As a result, certain types of toxic torts have been excluded from these states' dramatic modifications to the doctrine of joint and several liability.\textsuperscript{161}

\textsuperscript{152} See Bradley, supra note 85.
\textsuperscript{153} See id.
\textsuperscript{154} See id.
\textsuperscript{155} See id.
\textsuperscript{156} See Torts Reform Enactments, supra note 82, at 2, 4.
\textsuperscript{157} See id. at 2.
\textsuperscript{158} See id. at 4.
\textsuperscript{159} See id.
\textsuperscript{160} See Eggen, supra note 11, at 1718 n.75.
\textsuperscript{161} See id. Arizona exempts actions relating to hazardous wastes or solid waste disposal sites. See id. Idaho exempts actions "arising out of a violation of any state or federal law or regulation relating to hazardous or toxic waste or substances or solid waste disposal sites." See id. Illinois exempts actions involving hazardous waste or environmental pollution, except claims against response action contractors. See id. Minnesota exempts any claim arising out of the violation of an environmental or public health law. See id. Nevada exempts actions arising from "emission, disposal or spillage of a toxic or hazardous substance." See id. New Jersey currently exempts actions seeking damages for personal injuries or death where the cause of the damages is the negligent manufacture, use, disposal, handling, storage, or treatment of hazardous or toxic substances. See id. New York exempts actions arising from releases into the environment of hazardous substances or hazardous waste. See id. Oregon exempts actions arising out of the violation of state or federal standards for air pollution, hazardous waste, hazardous substances, or radioactive waste. See id. Texas exempts actions arising from the depositing, discharge, or release into the environment of any hazardous or harmful substance. See id. Washington exempts actions arising from hazardous waste or substances or solid waste disposal sites. See id. Hawaii's
As in many toxic tort cases, joint and several liability was appropriate in the Woburn case. In both the Woburn case and in most toxic tort cases, several defendants may have contributed to the pollution in question. In fact, cases like the Woburn case are usually cited as the classic argument for joint and several liability because they involve numerous chemicals that have commingled and changed from their original composition. Without joint and several liability, the Woburn plaintiffs would have had to attempt to apportion the harm they suffered, a practically impossible task given their indivisible injury. Joint and several liability serves to relieve the burden of difficult causation problems such as these, which are typically associated with toxic tort litigation.

Finally, if the Woburn plaintiffs had not been able to utilize the doctrine of joint and several liability, Grace and Beatrice would have been free to point the finger at each other. This finger-pointing would have made both settlement and trial more difficult for Schlictmann. If he had settled with one defendant, the remaining defendant could have attempted to place the blame on the first defendant at trial, leaving it to Schlictmann to, in effect, defend the settling party.

VI. CONCLUSION

Tort reform’s agenda of controlling frivolous lawsuits is an insufficient reason to deny the protection of the court system to poor or minority victims of toxic torts. That tort reforms might obstruct plaintiffs’ quests for environmental justice is evidenced by statements of A Civil Action’s protagonist: Jan Schlictmann says he never would have considered taking the Woburn case if the proposed federal tort reforms had existed in 1983. The case was too complicated and expensive for toxic and asbestos-related torts and torts relating to environmental pollution expired in October 1995 by statutory mandate. See id.

Additionally, a recent proposal in New Jersey would expand its current exception. See Anderson, supra note 55, at S14. Currently, New Jersey exempts toxic torts from the general elimination of joint and several liability. See Eggen, supra note 11, at 1718 n.75. The current bill would require that solvent defendants in toxic tort cases share damages with co-defendants who are bankrupt whenever the solvent defendants are responsible for more than five percent of the total damages. See Anderson, supra note 55, at S14.

162 See Harr, supra note 15, at 78, 81; Eggen, supra note 11, at 1718 n.74.
163 See Courtney, supra note 147, at 26.
164 See Steenson, supra note 140, at 483.
166 See Franklin, supra note 106, at 64.
sive to prepare, he contends, and the families were not wealthy enough to pay for the litigation costs.168

Because their progress was not impeded by tort reform, the citizens of Woburn were able to access the court system and recover some of their damages. A message of *A Civil Action*, however, is that future victims of similar injustice may not be so lucky. In Jonathan Harr’s words, “The Woburn case is an example of the way the courts are supposed to work. The Republicans’ bill would dismantle a system that isn’t perfect, but one that gives both citizens and corporations their day in court.”169

The Woburn case is indeed an example. Through the events chronicled in *A Civil Action*, the reader can see the dangers of tort reform to poor people who are injured by hazardous waste. The Woburn case was a mass tort of staggering complexity that was incredibly expensive to litigate. It involved multiple defendants and several victims, and was brought as class action by a lawyer working on a contingency fee basis. Many of the families’ injuries were indivisible. Because of these characteristics, the Woburn case serves as a consummate illustration of the vulnerability of toxic tort cases to many tort reform measures that limit class actions, contingency fee arrangements, awards of damages, and the use of joint and several liability.

168 See id.
169 Id.