

WHO SHOULD MAKE AMERICA'S TORT LAW: COURTS OR LEGISLATURES?

Washington Legal Foundation MONOGRAPH

The balance of power between state courts and legislatures over who creates “law” has always been tenuous. Courts create “common” law through their rulings. Popularly elected legislatures create law by passing statutes, often in areas where courts have created and are still creating common law. This delicate balance has become increasingly strained, and in some states, has broken down, in the area of who makes states’ liability, or tort, law. Courts in some states have retroactively created new causes of action with no basis in precedent, while others have used state constitutions to declare various legislative reforms of the tort system invalid. Each branch of government’s understanding of its respective role is critical because tort law affects citizens every day. This tenuous balance is also important because it threatens elected officials’ rational efforts to reform the civil justice system.

In this battle between courts and legislatures, a fundamental part of legal history has been ignored. At their initial formation, states incorporated or “received” the common law of England. At the same time in these “reception statutes” legislatures delegated authority to courts to “make” further common law in accordance with that state’s “public policy” while reserving the right to take such power back. The state common law of torts evolved in an incremental fashion for nearly 200 years.

In the 1970s, however, some states’ courts began to issue decisions that imposed sudden, revolutionary change, altering plaintiffs’ and defendants’ rights and responsibilities to the detriment of both groups of litigants and society in general. When legislatures reasserted their law making authority to rein in these judicial excesses, plaintiffs’ interests challenged the resulting statutes in court. In *sixty* instances, judges have been willing to broadly interpret state constitutional guarantees to strike down state tort reform legislation.

Leading tort law expert **Victor E. Schwartz** of the law firm Crowell & Moring, along with two colleagues, **Mark A. Behrens** and **Mark D. Taylor** focus on the increasing tort law-making imbalance in a Washington Legal Foundation monograph. It features a foreword by **U.S. Senator Jay Rockefeller** and an introduction by President of the Arizona State Senate **John Greene**.

The monograph provides a brief but instructive discussion of the evolving imbalance and explains how it will negatively affect tort litigants and the greater legal system. It also relates possible ways in which the main participants in the debate — courts and legislatures — can find a reasonable accommodation, primarily by discussing a model code that has been developed for use in affected states.

The authors’ exhaustive research in support of their arguments and information is contained in four separate appendices, which summarize all cases where courts have overturned or upheld state tort reform laws, and provides the language of each state’s respective “reception” statute and the terms of the model code referred to in the monograph’s text.