

Tort Reform: An Overview of H.B.4

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1. Proportionate Responsibility
 - a. Ensures that named defendants will be responsible only for the proportion of fault attributable to them by allowing the jury or fact finder to consider the conduct of all potentially responsible persons, who are designated as such, when allocating fault for a plaintiff's injury.
 - b. When a responsible person is designated, the jury may allocate fault to any such person, including a bankrupt, criminal, person beyond the court's jurisdiction, or employer with worker's compensation immunity.
 - c. Does not impose additional liability or cost on businesses that carry worker's compensation insurance or others who are not parties to the case or are immune from liability.
 - d. If a non-party is designated as a responsible person, the plaintiff may bring the designated person into the case, even if the applicable statute of limitations has already run.
 - e. Provides that the credit for the pre-trial settlement by another defendant in cases other than healthcare liability claims is based on the percentage of responsibility allocated to the settling defendant, rather than being based on the amount of the settlement or the sliding scale alternative, thereby eliminating the dollar-for-dollar credit and sliding scale options.
 - f. Provides that the credit for the pre-trial settlement by another defendant with respect to healthcare liability claims is based on the total dollar amount of the settlements unless all nonsettling defendants agree to a credit based on the percentage of responsibility allocated to the settling defendant.
 - g. Corrects a problem with the definition of "claimant" that was identified by the Texas Supreme Courts.
 - h. Applies to actions filed on or after July 1, 2003.
2. Products Liability Reform
 - a. Establishes a 15-year statute of repose for product liability claims, except in "latent disease" cases, in which the disease does not manifest for many years after use of the product.
 - b. Creates an "innocent retailer defense" under which a retailer cannot be held liable for a product defect unless the retailer has some actual responsibility for the defect.
 - c. Numerous exceptions to the defense are provided, including an exception that prevents use of the defense if the responsible manufacturer is outside the court's jurisdiction or insolvent.
 - d. Provides protection from liability, through the use of a rebuttable presumption, to manufacturers, distributors, or prescribers of pharmaceutical products in cases in which it is alleged that the defendant failed to provide an adequate warning about the product's risk.
 - e. Defense is available if the defendant provided government approved warnings with the product.

- f. Several exceptions are provided, including one making the defense inapplicable if the manufacturer misrepresented or withheld required information from the government.
- g. Provides additional protection from liability, through the use of a rebuttable presumption, for manufacturers who comply with federal standards or regulatory requirements applicable to a product.
- h. Protection is available only if the standard was (1) mandatory, (2) applicable to the aspect of the product that allegedly caused harm, and (3) adequate to protect the public from the risk.
- i. Requires the Texas Supreme Court to revise the Texas Rules of Evidence to conform them to the Federal Rules of Evidence in regard to the admissibility of "subsequent remedial measures" in a products liability action.
- j. Applies to actions filed on or after July 1, 2003.

3. Offer of Settlement

- a. Provides incentives for parties to make and accept reasonable settlement offers early in lawsuits by shifting litigation-related costs when a party refuses a pre-trial settlement offer that turns out to be as good as or better than what that party ultimately receives.
- b. This cost-shifting mechanism is available in most civil cases, and comes into play only upon the defendant filing an election to have the mechanism in play in that case.
- c. The defendant's litigation costs are shifted to the plaintiff if the plaintiff's judgment is less than 80% of the defendant's settlement offer.
- d. The plaintiff's litigation costs are shifted to the defendant if the plaintiff's judgment is more than 120% of the plaintiff's settlement offer.
- e. If litigation costs are shifted against the claimant, they are awarded as an offset against the plaintiff's recovery against the defendant (such that a prevailing defendant receives no recovery for attorney's fees against a plaintiff who loses on liability or is awarded no damages).
- f. Even if costs are shifted against the plaintiff, a prevailing plaintiff still recovers at least 50% of his or her economic damages after subtracting the amount of any statutory liens against the plaintiff's recovery.
- g. Applies to actions filed on or after January 1, 2004.

4. Health Care Liability Reform

- a. The limit on non-economic damages varies based on whether the defendant is a physician or health care provider other than a health care institution. A \$250,000 cap applies to health care providers other than health care institutions on a per claimant basis, and a \$250,000 cap applies to health care institutions on a per defendant basis; total damages against health care institutions, collectively, cannot exceed \$500,000 in any single case.
 - i. Cap on non-economic damages not indexed for inflation.
 - ii. Health care provider not required to maintain proof of financial responsibility in order for cap on non-economic damages to apply.
- b. In the event that the foregoing statutory limit is invalidated, an alternative limit on non-economic damages is established and varies based on whether the defendant is a health care provider other than a health care institution. A \$250,000 cap applies to health care providers other than health care institutions on a per claimant basis, and a \$250,000 cap applies to health care institutions on a per defendant basis not to exceed \$500,000 in any single case.
 - i. Cap on non-economic damages not indexed for inflation.
 - ii. Cap on non-economic damages applies to hospital that provides proof of financial responsibility:
 - (1) effective 9/1/03 - \$500,000 per claim; \$1.5 million aggregate
 - (2) effective 9/1/05 - \$750,000 per claim; \$2.5 million aggregate
 - (3) effective 9/1/07 - \$1 million per claim; \$3 million aggregate
 - iii. Cap on non-economic damages applies to physician or registered nurse who provides proof of financial responsibility:
 - (1) effective 9/1/03 - \$200,000/\$600,000

- (2) effective 9/1/05 - \$300,000/\$900,000
 - (3) effective 9/1/07 - \$500,000/\$1 million
 - iv. Cap on non-economic damages applies to physicians in residency training programs who provide proof of financial responsibility of \$100,000/\$300,000.
 - v. Proof of financial responsibility established by:
 - (1) purchase of liability insurance or plan of insurance; or
 - (2) purchase of coverage through risk retention group
 - (3) maintenance of reserves in financial institution or letter of credit
- c. Limitation on damages in wrongful death and survival cases.
 - i. Cap on damages of \$500,000 (including both compensatory and exemplary and punitive damages) indexed for inflation since 1977.
 - ii. No cap on recovery of past or future health care expenses.
 - iii. Liability of insurer under Stowers' Doctrine limited to liability amount of insured.
- d. Requires future medical expenses to be paid as they accrue.
- e. Allows future damages other than medical expenses to be paid through periodic payments.
 - i. Future damages in excess of \$100,000 may be made by periodic payments rather than by lump-sum, but court not required to order periodic payments plan.
 - ii. Judgment shall specify how and when the periodic payments are made.
 - iii. Periodic payments of future health care will terminate upon death of recipient.
 - iv. Periodic payments of future earnings will not terminate upon death of recipient.
 - v. Court shall require defendant(s) to provide proof of adequate insurance or post security adequate to assure full payment of the periodic payment.
 - vi. Attorney fees are paid at time of judgment based on present value of future damages.
- f. 10 year statute of repose established for health care liability cases.
- g. Requires jury instructions on circumstances associated with delivery of emergency care.
- h. Provides that standard of proof in cases involving emergency care is preponderance of evidence.
- i. Modifies pre-trial procedures to address frequency of claims.
 - i. Eliminates cost bond requirement.
 - ii. Allows parties to extend date for serving expert report by agreement.
 - iii. Defendants must object to sufficiency of report within 21 days.
 - iv. Allows time extensions to cure deficiencies in expert report.
 - v. If expert report is not timely filed, the court shall dismiss the action and award attorney fees and costs to defendant(s).
 - vi. Allows interlocutory appeal if trial judge fails to dismiss claim due to failure to meet expert report requirement.
- j. Establishes process for disclosure of patient's medical records in compliance with HIPAA confidentiality requirements.
- k. Clarifies qualifications for expert rendering opinion on causal relationship between injury and alleged departure from applicable standard of care.

- l. Establishes qualifications for expert in suit against provider, other than a physician.
 - m. Clarifies how the Good Samaritan Law applies to health care providers who respond to emergency situations.
 - n. Limits liability of hospitals that provide charity care services.
 - o. Clarifies the limitation on punitive damages in health care liability cases.
5. Claims Against Employees of a Local Governmental Unit
- a. Extends current limit on personal liability of governmental employees to health care workers employed by a local governmental unit.
 - b. Limits liability of nonprofit organizations that manage a city or hospital district hospital.
6. Limitation of Liability for Nonprofit Hospitals
- a. Limits the liability of a nonprofit hospital or hospital system that provides charity care and community benefits in an amount equal to at least 8% of the net patient revenue of the hospital or system, and provides at least 40% of the charity care provided in the county in which the hospital or system is located.

7. Class Actions
 - a. Gives jurisdiction to the Texas Supreme Court to hear an appeal from a trial court order certifying or refusing to certify a class.
 - b. Stays all proceedings in the trial court pending that appeal.
 - c. Requires the Texas Supreme Court to promulgate rules to be used by trial courts in calculating the fees to be awarded to class counsel, including rules requiring that:
 - i. the fee be calculated using the lodestar method, which requires a reasonable fee based on the hours actually worked by class counsel.
 - ii. if part of the recovery by the class is non-cash, the fee paid to class counsel must be in cash and non-cash in the same percentage as the recovery by the class.
 - iii. Requires that before a class is certified, the trial court must rule on any plea to the jurisdiction in which it is asserted that the plaintiff's claims are within the jurisdiction of a state agency.
8. Multi district Litigation
 - a. Creates the five-member Judicial Panel on Multi district Litigation, appointed by the Chief Justice of the Texas Supreme Court, that is empowered to transfer factually related cases pending in multiple counties to a single court for consolidated or coordinated pretrial proceedings.
 - b. The cases must be returned to the county in which the case was filed for trial.
 - c. This procedure, which is modeled on federal law, provides for more consistent outcomes and reduces the overall cost of large-scale litigation by creating a procedure for consolidating cases with common fact questions.
9. Venue
 - a. Fixes an anomaly in the current law by allowing an immediate appeal of a trial court's decision that a plaintiff in a multi-plaintiff case has independently established venue in the county of suit.
10. Forum Non Conveniens
 - a. Creates a single standard - based on federal law - for determining whether a case should be dismissed so that it may be pursued in a more appropriate state or country.
 - b. The court will be able to dismiss a case that has no connection to Texas and should have been brought in another state or country if dismissal is in the interest of justice and for the convenience of the parties.

11. Judgment Interest
 - a. Prohibits the assessment of pre-judgment interest on an award of future damages.
 - b. Establishes a post-judgment interest rate that is based on the prime rate and, therefore, more closely reflects market conditions.
 - c. Adjusts the current floor and ceiling for the post-judgment interest rate from 10%-20% to 5%-15%.
12. Appeal Bonds
 - a. Modifies the rules relating to appeal bonds so that the cost of the bond alone will not make the appeal of a trial court judgment prohibitive.
 - b. Limits the bond requirement to compensatory damages awarded to the plaintiff and places reasonable limits on the total amount of a bond.
13. Evidence Regarding the Use of Seat Belts
 - a. Allows the jury or fact-finder to know whether a plaintiff was wearing a seat belt at the time of an accident for the purpose of allocating fault and determining the cause of damages.
 - b. Applies to actions filed on or after July 1, 2003.

14. Damages
 - a. Requires jury awards of punitive damage to be based on a unanimous jury verdict.
 - b. Limits recovery of health care expenses to expenses actually incurred by or on behalf of the plaintiff.
 - c. Allows the jury to consider a plaintiff's income taxes when awarding lost future income.
15. Public School Teachers
 - a. Provides additional protection for teachers against litigation related to the actions taken by the teacher at school.
16. Successor Liability For Asbestos Related Litigation
 - a. Limits a successor corporation's liability in asbestos related litigation to the amount of the assets of the acquired company if the acquisition that generated the asbestos related liability took place before May 13, 1968.
17. Volunteer Immunity
 - a. Provides protection from lawsuits for volunteers of charitable organizations and volunteer firefighters.

18. Design Professionals
 - a. In a suit against a registered architect or licensed professional engineer, requires the plaintiff, at the time suit is filed, to provide an affidavit by a third-party registered architect or licensed professional engineer setting forth the specific acts of negligence it is alleged the defendant committed.
19. Migration of Particles in the Air
 - a. Allows trespass action for migration or transport of an air contaminant only on a showing of actual and substantial damage to the plaintiff.