FALL 2021

TLR ADVOCATE

TEXANS FOR LAWSUIT REFORM: MAKING TEXAS A BEACON FOR CIVIL JUSTICE IN AMERICA

FALL 2021

IN THIS ISSUE

OUR MISSION

Texans for Lawsuit Reform is a volunteer-led organization working to restore fairness and balance to our civil justice system through political action, legal, academic and market research, and grassroots initiatives. The common goal of our more than 18,000 supporters is to make Texas the Beacon State for Civil Justice in America.

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MAKE TEXAS A BEACON for CIVIL JUSTICE in AMERICA

Leg Ad Pd for by Texans for Lawsuit Reform
Richard J. Trabulsi Jr., Chairman
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Houston, We Have a Problem

By Richard J. Trabulsi Jr., TLR Chairman

It is not only Houston, but our entire state, that has a problem. An earthbound problem. We are choosing our third branch of government—the judiciary—without regard to a person's qualifications to be a judge.

If you were choosing a lawyer, you would exercise due diligence to select a lawyer with the credentials to handle your matter competently. And if you were going to court, you would want a qualified judge to hear your case.

Yet in Texas, every judge is chosen by partisan election. Texas has two high courts—the Supreme Court and the Court of Criminal Appeals—and each has nine justices. They decide the most important issues of civil and criminal law. All 18 justices are elected. How many of these 18 justices can you name? When you voted for or against them, how aware were you of the candidates' qualifications for the highest judicial offices in Texas?

In Harris County (Houston), there are usually about 70 judicial offices on the ballot. I care a lot about the law and our courts, yet even I am incapable of casting *informed* votes for 70 judicial positions.

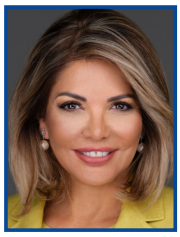
Statutes, regulations and judicial precedent establish the rule of law, but only if we have judges who understand them and apply them faithfully.

Unfortunately, on many of our trial courts and intermediate appellate courts, we have judges who lack the knowledge, experience or impartiality requisite to being a good judge. I draw your attention to page four of this *Advocate*, which details shenanigans on the Texas Fifth Court of Appeals in Dallas. The majority of members of that court violated normal processes in order to change the outcome of a case that had been decided by the court's own three-judge panel. That is deeply troubling.

Let's work together to establish a more sensible judicial selection process to place impartial and competent judges on our courts.

TLR and the Texas Civil Justice League propose a selection process with these essential elements: (1) the governor nominates individuals to fill judicial vacancies as they occur; (2) a non-partisan panel of citizens rates the nominees as highly qualified, qualified or unqualified, based on specific guidelines set by the Texas Legislature; (3) the nominee must be approved by a two-thirds vote of the Texas Senate; (4) if approved, the appointed judge serves for a maximum of 12 years; and (5) within two years of assuming the bench, the judge stands for a "retention" election in which citizens can vote the judge off the bench.

We have passed meaningful tort reforms over the last quarter-century. But, as we see every day in Texas, those reforms lose meaning in the hands of biased or incompetent judges. ■



The Appropriate Role of a Judge

By Eva Guzman, Former Justice of the Supreme Court of Texas

A recent job posting for a magistrate position on the federal court in Waco, Texas, contained two unusual and perplexing sentences:

> ***"The essential function of the courts is to dispense justice. An important component of this function is the creation and maintenance of diversity in the court system."***

Similar language appears across a number of job postings related to the federal courts and the U.S. Department of Justice.

As a member of the Texas judiciary for 22 years, I followed the methodology of the late U.S. Supreme Court Justice Antonin Scalia in construing statutory text. The appropriate role of a judge is to impartially apply the law (constitution, statute, regulation or court precedent) to the facts in the case being decided.

It is not appropriate for the judge to impose personal views on public policy or to opine what the law "should be." Nor should a judge produce a contrived decision based on his or her own concept of a "just" outcome.

What does "dispense justice" even mean in the context of the job posting? To some, the two sentences above might suggest that a judge is supposed to pre-decide what the judge thinks is the "right" outcome and then engineer the decision to achieve that outcome.

The function of a court is to resolve civil disputes and criminal prosecutions by applying law to the facts, without fear or favor. The essential function of a judge is to be an independent, neutral arbiter of disputes by allowing the law and facts to determine the outcome.

And what does "diversity in the court system" mean? While in many contexts diversity is an admirable goal, diversity could hardly supersede impartiality in our legal system. Civil and criminal cases should be blind to ethnicity, gender or any other diversity factors. Justice is not blind if it is based on the physical attributes of the parties standing in the courtroom. Justice is served by adherence to the law that applies to the case.

"Justice is not blind if it is based on the physical attributes of the parties standing in the courtroom. Justice is served by adherence to the law that applies to the case."

I am proud of my Hispanic heritage. I am proud of the contribution Hispanics have made to the great state of Texas, from its inception to now. Likewise, I am proud of my achievements as a woman, a wife and a mother. But when I presided over a case as a family court judge in Houston, or when I decided cases as a justice on the court of appeals or as a member of the Supreme Court of Texas, I looked at the facts of the matter being decided and then applied the law to those facts to make a decision. That is what any judge—male or female, of any ethnicity or heritage—should do.

Our system of justice works best when court officials—chosen based on merit and qualifications—impartially decide cases and uphold the rule of law. ■

"Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience."

–C. S. LEWIS

The Most Important Law Firm in Texas

By Richard W. Weekley, TLR Senior Chairman

Texas is home to one of the largest, most active law firms in the nation, with more than 4,000 employees in 38 divisions and 117 offices across the state. Its 750 attorneys handle more than 30,000 cases each year, many of them among the most complicated and high-profile legal issues facing the state.

This isn't a new patent practice. It's not a real estate practice. It's not even an oil and gas practice.

It's the Texas Attorney General's Office.

Then-Attorney General Greg Abbott once joked that his job was to "go to work, sue the Obama Administration and go home." And while protecting the state from federal overreach is a major component of the job, the work of the Texas Attorney General's Office is critical to the lives of countless Texas families, to state agencies and to our communities.

Officially, the Attorney General's Office is tasked with defending the state, state agencies and laws passed by the Legislature; administering the state's child support program; pursuing certain types of criminal prosecutions; protecting taxpayer dollars from waste, fraud and abuse; defending our state from federal intrusions; and protecting the liberties of all Texans.

From issues like election security to mask mandates, the attorney general is responsible for representing the state's—and Texans'—interests in court.

The office's duties go further still, handling cybercrime cases—including child pornography and identity theft—prosecuting election fraud, administering programs for crime victims, prosecuting price gauging during natural disasters and ensuring sex offenders are properly registered. Perhaps the function that touches the most Texans is the office's child support enforcement role, which collects billions of dollars each year on behalf of Texas children. These payments can literally be the difference between going hungry and having food on the table for many kids across the state.

Every four years, Texas hires a lawyer to lead this agency—the attorney general. The next election for attorney general will be in 2022.

A competent attorney general will be a skilled litigator who values the rule of law and protecting the Constitution. For this reason, some of the most successful attorneys general in our state's history have been former judges, including Abbott and Sen. John Cornyn.

A respected attorney general will help draw the best legal talent in Texas to public service at the agency, building a bench of experienced attorneys to handle complex litigation on behalf of the state. This includes a solicitor general, who handles the state's appellate litigation and ensures consistency in its legal positions, and assistant attorneys general to oversee the work of the various divisions in the office.

With so much on the line at this critical agency, it's more important now than ever that we have an attorney general with strong legal experience, unparalleled judgment, unquestioned integrity and the ability to attract and retain world-class lawyers to run its various divisions. ■

THE DIVISIONS WITHIN THE TEXAS ATTORNEY GENERAL'S OFFICE HANDLE A WIDE ARRAY OF ISSUES, INCLUDING:

- **Antitrust**
- **Bankruptcy & Collections**
- **Child Support**
- **Civil Medicaid Fraud**
- **Colonias**
- **Consumer Protection**
- **Crime Victim Services and Victims Assistance Grants**
- **Criminal Prosecutions**
- **Environmental Protection**
- **Gangs & Juvenile Justice**
- **Human Trafficking**
- **Law Enforcement Defense**
- **Legal Technical Support**
- **Open Records**
- **Tax Litigation**
- **Tort Litigation**
- **Transportation Litigation**

Troubling Procedural Irregularities Brought to Light on the Dallas Court of Appeals

By Rebecca Ward Helterbrand, TLR Outside Counsel

Something strange is going on behind closed doors on Texas' Fifth Court of Appeals in Dallas.

In concurring opinions for two recent cases, Justice David Schenck revealed internal procedural irregularities occurring within the court. According to Schenck, the majority took questionable procedural actions that demonstrate a recurring abuse of power, which he characterized as "obstruction." Let's take a closer look at one of those cases.

Steward Health Care System LLC v. Saidara

The procedural issues in this case arose when non-panel justices prevented the release of a three-justice panel's opinion.

The parties to this appeal last filed briefs in June 2019 and—pursuant to normal court procedures—the case was argued to a randomly assigned three-justice panel in October 2019. Originally, the panel consisted of Schenck and Justices Bill Whitehill and Leslie Osborne.

Schenck revealed that about ten months after oral argument, Osborne, who was assigned to author the panel's decision, circulated an opinion contrary to what the three justices discussed at their post-argument conference. Accordingly, a further conference took place in September 2020, and Osborne agreed to consider material revisions to her draft opinion. Whitehill then lost his reelection bid in November 2020, meaning his service on the court would conclude at midnight on December 31.

Three days after the general election and over a year after oral argument, Osborne responded to questions raised in the September conference. On Nov. 23, 2020, it became clear a new majority opinion was necessary. That opinion was circulated and approved on Dec. 9, 2020, and a dissent was finalized before December 31.

The panel's decision, thus, was made before Whitehill's term ended, *yet the court refused to release it in accordance with standard operating procedure*. Instead, the chief justice designated a new justice to serve in Whitehill's place, altering the panel's vote count. Then the court voted to reconsider the case *en banc* in February 2021, meaning the entire 13-member court would re-hear the case.

According to Schenck, these efforts were contrary to the rules of appellate procedure and were not authorized by internal court operating procedure, allowing the majority to obstruct the panel's right to release its decision late in 2020. Schenck notes that a reasonable observer could conclude the *en banc* reconsideration not only further delayed resolution of the case, but was an attempt to conceal efforts to change the panel's results.

More concerningly, when Schenck circulated a draft opinion suggesting the majority may have engaged in unethical behavior, he *"received entreaties urging—notwithstanding the facts or law—that he withdraw [the incriminating] part of [his] opinion" in exchange for the other justices changing their votes in line with the original panel's decision*.

This offer to change the court's decision in exchange for Schenck's silence is a clear violation of the parties' due process right to have their case decided on the merits, not based on "horse trading."

It is highly unusual for a judge to reveal the internal procedures (and conflicts) of a court. In bringing these issues to light, Schenck wrote, "I find myself in the unenviable position of being legally and ethically compelled to disclose to the parties my objections to irregularities in the process by which this case was decided," and that, "my duty to uphold and defend the [C]onstitution forbids me to acquiesce or to appear complicit in a process that I understand to violate it and compels me to take corrective action." ■

Justice David Schenck

Justice David Schenck is a skilled and competent judge with over 25 years in private practice and government service. He has been a justice on Dallas' Fifth Court of Appeals since his appointment by Gov. Rick Perry in 2015.

Schenck was a law clerk for U.S. Fifth Circuit Court of Appeals Chief Judge Henry A. Politz, a partner at Hughes and Luce LLP and Jones Day and a member and chair of specialized litigation and advanced motion practice at Dykema Gossett. He is board certified in civil appellate law.

New–and Familiar–Faces on TLR's Board

"Individual commitment to a group effort—that is what makes a team work, a company work, a society work, a civilization work." – Vince Lombardi

One of TLR's greatest strengths is the commitment of many talented people to our cause and organization. It is what distinguishes us in our advocacy and has contributed to our long-term success in shaping Texas public policy.

It's also what will guide us into the next quarter century of our advocacy, as we work to fulfill our mission to keep Texas' legal system fair, efficient and accessible for all.

Building on the outstanding leadership that comprises our board of directors, TLR is proud to announce the addition of **Mary Tipps**, **Lee Parsley** and **Jeff Shellebarger** to our board. They join Dick Weekley, Dick Trabulsi, Alan Hassenflu, Fred Heldenfels, Hugh Rice Kelly, Shad Rowe, Marc Watts and Michael Weekley on the board, which provides strategic guidance and corporate governance to our organization.

Mary Tipps

Lee Parsley

Jeff Shellebarger

Mary has been with TLR for 18 years and will continue to serve as our executive director. She is critical to our advocacy efforts at the Capitol, and her creativity and genuine care for others are unmatched in elevating TLR's profile among legislators and staff (look no further than Puppy Paws and Makin' Laws, a Mary Tipps-brainchild event hosted by TLR each session that brings shelter dogs to the Capitol for stress relief and adoption opportunities).

Prior to joining TLR, Mary worked in marketing, which took her from Mexico to North Texas. She is a graduate of The University of Texas at Austin with a bachelor's degree in Latin American studies. She was appointed by Gov. Bush to the Texas Department of Housing and Community Affairs Colonia Resource Committee. She also served on the Lieutenant Governor's Task Force on Preventing Child Abuse and on the Dress for Success Board of Directors, serving as president. She was named Volunteer of the Year by the Austin Children's Shelter in 2003 and 2008.

Lee will continue serving as TLR's general counsel. He has been with TLR since 2002, drafting legislative proposals, testifying in committees and working for passage of TLR's agenda with members of the Legislature.

Lee received an undergraduate degree and MBA from Texas Tech University before graduating from the Texas Tech University School of Law. He is a board certified civil appellate lawyer and has practiced for more than 30 years. Lee served for eight years on the Texas Board of Law Examiners, including as chairman. He was the first rules staff attorney for the Texas Supreme Court, where he assisted in rewriting the Texas Rules of Appellate Procedure, merging the Texas Rules of Civil and Criminal Evidence and revising the rules governing pretrial discovery in civil cases.

Jeff is a retired president of Chevron's North America Exploration and Production Operations. Jeff holds bachelor's and master's degrees in geology from the University of Georgia and has over 40 years' experience in the global oil and gas industry. During his 38-year career with Chevron, Jeff held upstream leadership and technical positions in Angola, Indonesia and various U.S. locations. He remains active in the energy industry and in the Houston business community. ■

Please visit www.tortreform.com to get the latest news and updates about Texas' legal system.

Fixing Texas' Intermediate Appellate Courts

By Lee Parsley, TLR General Counsel

Last year, the TLR Foundation published a history of Texas' 14 intermediate appellate courts. As noted in the paper, Texas has more intermediate appellate courts than the federal judicial system and any other state. Some of the courts are overworked, while others are underutilized. We have the dual distinctions of being the only state whose appellate courts have overlapping territories *and* the only state having trial courts reporting to two, three or four different intermediate appellate courts.

The paper made several recommendations, including advocating for a reduction in the number of intermediate appellate courts, either by merging existing courts or drawing new court districts. The proposals were illustrated with maps showing hypothetical districts that eliminated overlapping territories and limited the instances in which trial courts would report to multiple appellate courts. The paper also offered a methodology for determining the number of judges necessary to create an approximately equal per-judge workload on each court.

Legislative Proposals for Appellate Court Restructuring

In 2021, Senate Bill 11 (Sen. Joan Huffman), House Bill 339 (Rep. Phil King) and House Bill 2613 (Rep. Andy Murr) were introduced to resolve the overlapping boundaries of three intermediate appellate courts in northeast Texas.

The committee substitute for SB 11, however, proposed a major restructuring of these courts, reducing the number of intermediate appellate courts from 14 to seven. The goals of SB 11 were similar to the goals stated in the foundation's paper: equalize the courts' dockets, eliminate overlapping boundaries and minimize trial courts reporting to multiple appellate courts. The committee substitute initially received a favorable recommendation from the Senate Jurisprudence Committee, but that vote was reconsidered two weeks later and the bill did not advance out of committee. The House bills never received hearings.

Since TLR had not discussed appellate court redistricting with legislators prior to the start of the 87th Legislature, we testified in favor of SB 11 but did not otherwise engage on these bills in the session.

In 2007, the Texans for Lawsuit Reform Foundation joined a chorus of voices that had advocated for structural reform of the courts for decades. The foundation has since published two papers on this topic, providing a detailed history of the development of Texas' intermediate appellate courts, a description of the inefficiencies and defects in the existing system and a comparison to other jurisdictions. The papers discuss recommendations designed to repair the most obvious defects in order to achieve a more efficient and consistent structure that will benefit litigants, the judicial system and all Texans. All TLR Foundation papers can be read at **www.tlrfoundation.com.**

An Alternative to Redistricting the Appellate Courts

While TLR believes the basic structure of our intermediate appellate system should be seriously reviewed along the lines proposed in SB 11, reducing the number of appellate courts and changing their districts is not the only possible approach. For example, the Legislature could consider whether statewide random assignment of appellate cases, potentially coupled with reallocating some appellate court seats, makes sense for Texas.

Today, virtually all appellate proceedings are commenced by filing a document via the electronic filing system that is used by all Texas appellate courts. In a statewide case assignment system, the initiating document would be filed electronically, but the party filing the document would not pre-select the regional appellate court to which the case would be sent. Instead, the software would randomly assign the case to an appellate court, while making sure the random assignments equalized the courts' workloads.

There are benefits to a random-assignment system. First, in today's system, parties sometimes believe a particular court of appeals is philosophically aligned with one "side" or the other. A lawyer who is convinced (whether accurately or not) that the court of appeals will rubber stamp whatever judgment is achieved in the trial court has little incentive to moderate his or

her actions at trial. Instead, the lawyer is incentivized to "go for broke" at trial, while the opposing party is incentivized to resolve the case at any cost. But if the matter is randomly assigned to an appellate court, neither side can conclude that the ultimate resolution of the case is foregone because no one will be assured of a "friendly" appellate court. Both sides will have an incentive to moderate their actions at trial and act reasonably in regard to resolving the case through a settlement or plea agreement.

Second, judges seeking election to the courts of appeals will feel much less pressure to cater to local lawyers. Of course, most judges deny feeling such pressure, but human nature informs us all that the pressure exists nonetheless.

Third, as noted, the courts' dockets will be equal, meaning no judge or court is either overworked or underutilized.

Fourth, it will no longer matter that some trial courts answer to multiple appellate courts while others answer to only one appellate court. Under a random-assignment system, the trial and appellate courts will be required to apply the "law of the state," not the "law of the circuit." That is to say, each lower court in every situation will be asked to determine how it believes the highest court—not a regional appellate court—would resolve the issue at hand, and apply that law. All intermediate appellate court decisions would carry equal weight in all Texas trial courts. This is how Texas courts used to handle issues before an organized appellate bar began federalizing Texas' judicial system.

Fifth, it will no longer matter that Texas' appellate courts have overlapping geographic jurisdictions. The courts' boundaries will matter only in regard to election of the justices, not for the assignment of cases, and appellate court forum shopping is thus eliminated.

Ideally, all of the intermediate appellate courts in a random-assignment system would comprise the same number of justices. Today, some of Texas' intermediate appellate courts have as few as three justices and are still underutilized, while the largest court (Dallas) has 13 justices and is still overworked. Reassignment of justices across the system—so each court has six justices—is something the Legislature should consider as part of a random-assignment system.

Courtroom lawyers will complain they don't know how to try their cases because they don't know which court will hear their appeal. But uncertainty of the ultimate outcome will often be a virtue of the system, not a flaw.

Some lawyers may also complain that a random-assignment system will make it more difficult for local lawyers to handle an appellate case tried in one part of the state but referred to a far-off corner of the state for the appeal. Today, however, appellate briefs and all other documents are filed electronically, eliminating the need to travel to the appellate court except to participate in oral arguments. But a large percentage of appellate matters are already resolved on the briefs, without in-person oral argument. And the pandemic has shown that cases in which oral argument is deemed important can be effectively argued remotely, and at a significant savings to the clients.

While the mechanisms outlined above aren't perfect, they provide a marked improvement to several of the weaknesses apparent in our current intermediate appellate court system. ■

Legislation Creating a Statewide Intermediate Appellate Court

In Senate Bill 1529, Sen. Huffman proposed creating a new five-judge intermediate appellate court called the Texas Court of Appeals. The court was to have statewide jurisdiction to hear any appeal arising out of or related to cases brought by or against the state of Texas, or an agency, board, commission or officer of the state (with multiple exceptions, such as family law cases), and cases in which a party challenged the constitutionality of a state statute. Decisions of the court could be appealed to the Texas Supreme Court, which would remain the state's highest court for all civil matters.

Importantly, because the state is a party to administrative agency actions, this appellate court would hear appeals of agency decisions. Under Sen. Huffman's proposal, important rulings—sometimes multi-billion-dollar rulings—made by agencies such as the Public Utility Commission, Railroad Commission and Texas Commission on Environmental Quality, would be reviewed by the new court, made up of judges with in-depth knowledge of these kinds of cases.

A court such as the one proposed in SB 1529 is not a novel idea. The federal intermediate appellate court system comprises 12 regional courts (like Texas' 14 regional courts) and one court with nationwide jurisdiction to hear specialized cases, such as patent lawsuits. ■

HB 19: Don't Believe Everything You Hear!

Rep. Jeff Leach, Chair, House Judiciary and Civil Jurisprudence Committee

Whether fueled by misunderstanding the bill or misstatements by its opponents, media reports continue to assert false claims about House Bill 19—the vehicle collision lawsuit bill I authored in this session.

The narrative that the bill limits a commercial vehicle owner's liability to instances of gross negligence, or that only the driver (not the company) is held liable in a lawsuit, is not true and has never been true. Here are the facts.

HB 19 is a procedural bill. The heart of the bill is that it allows a defendant in a personal injury case involving a commercial vehicle to demand that the case be presented to the jury in two phases. *If the commercial vehicle owner stipulates that the driver of the vehicle was an employee working in the scope of employment at the time of the collision*, then two things happen. First, the plaintiff's burden is reduced because he or she does not have to prove that the employee was acting within the scope of employment at the time of the collision. Second, the defendant does not face a negligent entrustment claim in the first phase of the trial.

In this circumstance, the jury will hear only event-specific evidence in the first phase of trial. In every case, the jury will hear about the cause of the collision and the extent of the plaintiff's injuries in phase one. The jury may also hear evidence that the company was negligent in servicing, maintaining or loading the vehicle, or that the company allowed an intoxicated, unlicensed or suspended driver to operate the vehicle on the day of the collision—if any of these things caused the collision.

If the jury finds that the commercial vehicle driver caused the collision, *the company defendant will be held liable for the entire amount of economic and non-economic damages (including mental anguish and pain and suffering damages) awarded to the plaintiff.*

In the second phase of trial, the jury may hear a broader spectrum of evidence (not just event-specific evidence) about whether the company has a history of negligence in regard to employing dangerous drivers or operating dangerous equipment. The jury will use this evidence to determine whether to assess punitive damages against the company defendant.

If the company defendant does not stipulate that the driver was acting within the scope of employment at the time of the collision, the plaintiff may pursue a negligent entrustment claim against the company defendant in the first phase of trial in addition to pursuing a claim against the company on the basis that the employee was working within the scope of employment at the time of the collision.

This formulation makes sense. If the company is going to be held 100 percent responsible for damages caused to the plaintiff (once the plaintiff shows that the driver was responsible for the collision), there is no reason for the jury to have to also decide if the company was negligent in entrusting the vehicle to the driver. The plaintiff's damages are the same either way, and the company is going to pay them. It just wastes the jury's time to hear the additional evidence about alleged negligent entrustment.

On the other hand, if the company defends the case on the ground that the driver was "on a frolic" rather than operating the vehicle within the scope of employment, then the plaintiff can present evidence that the company should not have entrusted the vehicle to the driver in the first place because allowing the driver to operate the vehicle made it possible for the driver to go on the collision-causing frolic.

Importantly, HB 19's distinction about how negligent entrustment claims are handled at trial is merely a codification of longstanding Texas case law, made necessary by the fact that many courts were misunderstanding or ignoring the precedent.

HB 19 is a fair statute. No plaintiff who is truly injured in a commercial vehicle accident will be left uncompensated because of HB 19. Company defendants are not granted immunity. Those that have insurance or assets will continue to pay the full amount legitimately owed to injured plaintiffs. HB 19's procedures, however, will make it much harder for personal injury lawyers to extort settlements in cases in which the plaintiff caused the accident or to convert minor injury cases into massive verdicts. ■