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# Commentary

## CONSUMERS BEWARE - A LICENSE TO INJURE

IVAN E. BODENSTEINER\*

During the past ten years, much has been written about “tort reform.” With the opening of the 104th session of Congress in January 1995, several bills aimed at “reforming” the tort system have been introduced as part of the “Contract with America.” At the same time, similar bills have been introduced in a number of state legislatures. All of these proposals, in both the legislation and the literature, seem to have a common theme—limit the amount of damages available to tort victims. Thus, it is not surprising that the cry for “reform” is led by manufacturers whose products cause injuries to people, professionals—such as physicians—whose malpractice causes injuries, and insurers. Much of the rhetoric is phrased as an attack on the jury system. This is not surprising because the jury may be the one truly independent institution in our legal system; it is more difficult to influence jurors than legislators, judges, or executive officials.

In his Article titled “The Design of Compensation Systems: Tort Principles Rule, O.K.?,” Professor Palmer appears frustrated with the “progress” of the reformers in the United States. He suggests that “a fundamental reappraisal of the efforts at reforming American tort law needs to be undertaken” and that “it is time to reform the reformers.” In his opinion, “the solution to the United States tort problem is in fact to abolish tort as a means of dealing with personal injury and put no mandatory statutory substitute in its place.” According to Professor Palmer, “[b]efore anything good can happen, the beast must be slaughtered.” Professor Palmer’s proposal is based, at least in part, on the “lesson” to be learned from New Zealand’s accident compensation scheme, which originated in 1972 when New Zealand “eliminated tort as a means of compensating personal injury” and adopted a statutory scheme somewhat analogous to the workers’ compensation laws in the United States. As I understand Professor Palmer, he believes that the evils of the abandoned tort system in New Zealand continue to influence the statutory scheme and preclude, or at least hinder, complete reform. Thus, he suggests that there can be real reform only if the beast, tort law, is slaughtered and removed from our

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memory.

In fairness to Professor Palmer, I believe that he sees his proposal for abolishing tort law as part of a broader reform effort that would include increasing the availability of health care and other benefits. In other words, it appears that Professor Palmer advocates a "bigger" government that would assume greater responsibility for the needs and care of those who are injured by private parties. Interestingly, some of the most active supporters of "tort reform" in the United States are the most active opponents of health care reform. Further, these reformers claim to be advocates of a "smaller" government. Thus, the reformers in the United States appear to favor reducing the obligation of tortfeasors to provide for their victims' care *and*, at the same time, reducing or eliminating the government programs that might provide for some of the needs, created by those who cause injuries, of those who are injured.

Because Professor Palmer is obviously an expert in both tort law in the United States and the New Zealand experiment, and I am an expert in neither, it is indeed risky to attack his proposal. This response should, therefore, be viewed as a gut reaction of one who, as a lawyer, is more closely aligned with the plaintiff's bar than the defense bar. Further, I am somewhat reluctant to appear to defend tort law as it exists in the United States because, from the perspective of victims, it has many shortcomings. Certainly, American tort law could be improved. Hence, there really is a need "to reform the reformers."

This may be a bit too cynical, but here is one way to view the current debate about tort reform or, more accurately, "tortfeasor protection acts." The primary "whiners" in the debate are corporations and the insurance industry. Because tort law is primarily common law, it is made by state court judges. As a general matter, there is nothing in the backgrounds of most of these judges to suggest that they will unfairly favor victims over big business in tort litigation. Therefore, any expansion of tort doctrines has been the result of decisions of judges who, it is safe to assume, are not predisposed to favor victims. A possible explanation for this is that victims have presented compelling facts, that cry out for a remedy, in situations where the conduct of the defendants has been shocking.

As tort doctrines expand, it becomes less likely that cases will be disposed of by judges through motions to dismiss or motions for summary judgment. Consequently, juries will decide more cases and, in some cases, will award substantial compensatory damages, including damages for intangible injuries such as pain and suffering. Additionally, in rare cases, juries will award substantial punitive damages. Historically, even though many of the larger jury awards, of both compensatory and punitive damages, are reduced by judges as

a result of post-trial motions or appeals, the large jury verdicts are used as ammunition by the reformers without mentioning the ultimate judgment amount. The highly publicized case against McDonald's, resulting from the spill of super-hot coffee, is a good example of this.

In all likelihood, representatives of big business feel that state court judges, many of whom may have been helped by big business when seeking their judgeship, have failed them at least insofar as they are responsible for expanding tort doctrines. Similarly, a normally friendly United States Supreme Court has failed big business in its efforts to have punitive damage awards limited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Additionally, juries represent a real concern for big business because, at least theoretically, jurors are more likely to identify with victims than defendants in suits against corporations. Even the normal advantage of available resources enjoyed by defendants in tort litigation does not assure a more compelling presentation in the eyes of the jurors. Thus, to defendants, juries represent a "loose cannon" in the legal system. As suggested earlier, the jury's decision is one that cannot be bought because its members cannot be identified far enough in advance. Furthermore, as the laws and decisions make it more difficult to summarily exclude females and minorities from juries, it is more likely that juries will include people who have been victims of injustices. Although trial and appellate judges already exercise substantial control over juries, the reformers want more control.

One way to gain this control is to impose artificial statutory caps on damage awards, caps that are normally not communicated to the jury. Another alternative is to eliminate the entire tort system and replace it with something analogous to the workers' compensation program, like the New Zealand statutory program. Obviously, one could accomplish the goal of the reformers by following Professor Palmer's suggestion to eliminate the tort system and "let the losses lie where they fall." Each of these possible remedies requires legislative action, at least if reform is to be accomplished quickly. For this reason, the reformers have turned to the legislative arena. More specifically, they have turned to Congress because it is more efficient and less expensive for the reformers to deal with one legislative body than fifty state legislatures. Further, federal legislation gives big business the advantage of uniformity. It is easier to compute potential liability for marketing a defective product, and compare that liability to potential profits, when tort law is uniform throughout the country and imposes an artificial ceiling on damage awards. The reformers seem to have found a friendly forum in the 104th Congress which, despite all of its emphasis on returning matters to the states, seems willing to federalize aspects of tort law. Maybe if Professor Palmer was writing today instead of in November 1994, he would be less likely to "sense a mood of disillusionment about the prospects of taming the beast." Nonetheless, the reformers' push for

control over juries is not without opposition.

Obviously, the victims of tortious conduct lack organization and are unable able to mount the lobbying effort necessary to counter the efforts of the reformers. As in court, their interests are represented in Congress and state legislatures by various organizations of trial attorneys, such as the Association of Trial Lawyers of America. The credibility of these organizations has been attacked on the grounds that the attorneys have a self-interest in maintaining the current tort system because they benefit financially from large jury verdicts. Of course plaintiffs' attorneys, who normally depend on a contingent fee arrangement, have an interest in damage awards because they prefer to be paid for their services. This simply means that the trial lawyers who oppose tort reform are like most lobbyists, including the reformers, in that they have an interest in the issues they address in Congress.

The primary impetus for changing the tort system comes from those representing the interests of defendants, rather than plaintiffs, in tort litigation. Despite some of the rhetoric, reducing their costs and increasing their profits are the only apparent interests of these defendants. Not surprisingly, victims do not support these proposed reforms. If victims and consumers were polled, they would be unlikely to support caps on damage awards. Similarly, if employees or their unions were consulted, it is unlikely that they would support the workers' compensation system as a substitute for common law tort actions seeking compensation for work-related injuries. As a matter of policy, laws like the Occupational Safety and Health Act of 1970, and the huge bureaucracy that accompanies it, may not be necessary if common law tort actions were available to address such injuries. Simply put, workers' compensation laws are more accurately described as "employer protection laws."

Professor Palmer says that "[t]he performance of the tort system itself suggests a powerful case for abolition." In support of this, he points to the "scandalously high" transaction costs of the system, the lack of "any unambiguous evidence that the tort system has significant deterrent effects," the failure of the system to satisfy "a sense of justice between the injurer and the injured," and the system's ineffectiveness as a "public educator." These failures lead Professor Palmer to his conclusion that the tort system should be abolished:

I venture the opinion that the solution to the United States tort problem is in fact to abolish tort as a means of dealing with personal injury and put no mandatory statutory substitute in its place. As far as I can see, no one has previously suggested this but as a package it could be made quite attractive in terms of savings of costs for business, the economy, and judicial resources. No comparison with substitutes is necessary and the unfairness of the present forensic

lottery disappears. Accepting that the nature of the replacement cannot be agreed upon now, it would be better to start again. If personal injury were treated like fire insurance, a number of good things may happen. People could insure or not insure. If the law afforded no prospect of relief, then a number of disparate and creative means of addressing the problem would be likely to spring up. The economic advantages of such a move may be substantial. No longer would money be poured into an unprincipled and grossly wasteful system.

An analysis of this paragraph reveals several problems with Professor Palmer's proposed solution. First, it can be assumed that Professor Palmer is correct in saying his approach would be "quite attractive in terms of [the] savings of costs for business." What is not clear, however, is why that fact supports his proposal. Why is it better to compensate no victims of tortious conduct, and thereby save money for business, than to require businesses that cause injuries to compensate at least some of the victims for at least some of their injuries? Of course, for those who represent business interests, it is better because it means lower expenses, less concern about the safety of products, and greater profits. But from the perspective of victims, clearly Professor Palmer's solution is not better than the existing tort system because many of the victims will have no place to turn for full compensation. Additionally, it is unclear why there will be a "savings of costs for . . . the economy." As to a savings of judicial resources, if any category of civil litigation is eliminated, presumably there will be such a savings. But if that is our goal, why select tort actions? Removing so-called white collar crimes or drug offenses from the criminal code, for example, would result in a comparable savings of judicial resources.

Second, Professor Palmer argues that under his proposal, "the unfairness of the present forensic lottery disappears." If the unfairness to which he refers is that under the present system some victims are not compensated while others are over-compensated, there are other more equitable ways of addressing that situation. Professor Palmer would remove this disparity by not compensating anyone, thus treating all victims equally poorly. A better approach, however, might be to improve the system to assure that more victims are fully compensated. It is not readily apparent why prohibiting recovery for every victim is more fair than the present system, under which only some victims are fully compensated.

Third, it is suggested that "a number of good things may happen" if tort actions are abolished and "personal injury were treated like fire insurance." People who are concerned about personal injuries, Professor Palmer suggests, would buy insurance to cover potential losses. There are several problems with this analogy. Generally, people buy fire insurance or health insurance because

it is unlikely that there will be someone else responsible for the fire or illness that affects them. Consequently, as a matter of policy, there is no more appropriate candidate to bear the cost of such insurance. In contrast, when injuries are caused by the negligence of someone else, it makes sense to impose the cost of insurance on the party who is both at fault and, at least in some situations, making a substantial profit from the injury-causing activity. It may be that the risk of injuries caused by automobile accidents should be treated differently than the risks caused by fires, illness, or negligence in other situations because both parties in such accidents are engaged in what might be considered a dangerous activity that is licensed by the state. In such situations, therefore, it may be appropriate to make insurance the price for the license and allocate the cost without regard to fault.

If we rely on individuals to insure themselves against the risk of injury caused by the negligence of others, by means other than the automobile, there is no reason to believe that the results will be any better or more comprehensive than the results of the current health insurance system. Just as businesses are increasingly relieving themselves of the cost of providing health insurance to employees, Professor Palmer's scheme will relieve businesses of the cost of liability insurance. As with health insurance, a substantial percentage of our population will not be able to afford the cost of insurance for injuries inflicted by others. This raises an obvious question: what will happen to those who are unable to purchase insurance and suffer serious injuries and losses as a result of the negligence of another person or business?

When one is injured, the most tangible cost is health care, including rehabilitation, and the most tangible losses are wages and services provided to the family. The most likely source of health care today, for the uninsured, is through some government program, such as Medicaid. Presumably, if health care and rehabilitation services are made available to uninsured victims of personal injuries, the most likely source will be a government program. Similarly, the most likely substitute for wages is money provided through a government program. Therefore, the elimination of the tort system without a statutory substitute, as proposed by Professor Palmer, would likely transfer a substantial portion of these costs from the wrongdoers to government. This starts to resemble a form of corporate "welfare." Another portion of the cost would be transferred from the wrongdoers to those innocent individuals (potential victims) who are able, and willing, to purchase insurance.

Not only would the entire cost be transferred from the wrongdoers to either innocent individuals or government, a substantial portion of the injuries would go uncompensated because it is unlikely that government will compensate for intangible losses and injuries, such as pain and suffering, emotional and mental distress—the injuries Professor Palmer refers to as "nervous shock" or "the

mental injury suffered by a victim of the tortious act of another.” Of course, one could purchase insurance to cover these losses and injuries, but such coverage would increase the cost of insurance, making it financially unavailable to an even greater percentage of individuals.

Therefore, the likely result of Professor Palmer’s proposal can be summarized as follows:

- businesses and other wrongdoers would be relieved of all responsibility for the injuries resulting from their negligence, thereby saving the cost of insurance and settlements/judgments in tort actions;
- removing the threat of liability would give business a license to develop and market products without regard for the product’s safety in an effort to maximize profits;
- as product safety decreases, the risk of consumer injuries would increase;
- many individuals, who will never suffer injuries, would spend substantial amounts insuring against the possibility of such injuries;
- many individuals who cannot afford to buy insurance and are seriously injured as a result of someone else’s negligence would receive no compensation for lost wages, pain and suffering, and inconvenience and could be left with large medical bills; and
- government, as the “insurer” of last resort, would subsidize businesses and other wrongdoers.

An example will help demonstrate the difference between the current tort system and the likely result of Professor Palmer’s proposal. Assume a family of four in which the two children are in school and each parent works in a job that pays around \$7.00 per hour (\$14,500 per year, gross), with no benefits. One of the parents is seriously injured by a defective product being used in the home and is unable to work for two years. Medical and rehabilitation expenses total \$100,000 and lost wages total nearly \$30,000.

Under the current tort system, if a lawsuit is filed promptly, the suit may (at least in some jurisdictions) get to trial within three years after the incident. Assuming that liability is established, the plaintiff could reasonably expect a jury award of approximately \$130,000 for out-of-pocket loss, \$150,000 for pain and suffering, and possibly \$50,000 in punitive damages, if the plaintiff can meet the higher standard for such damages. Before the plaintiff receives any of the \$330,000 verdict, costs (\$18,000) and fees (\$142,000) will be deducted, leaving approximately \$170,000 for the plaintiff. After the medical and rehabilitation costs are paid, the plaintiff will be left with around \$70,000 for lost wages and pain and suffering. The total cost to the defendant and its insurer will be \$330,000, plus its costs (\$18,000) and fees (\$40,000), for a total of \$388,000,



without considering any tax consequences. The cost to government will be the cost of providing the judicial system.

In contrast, under Professor Palmer's proposal, there will be no cost to the company that made the defective product, and there will be little incentive to improve the product or remove it from the market. Because the family has no savings, the health care providers will look to a government program for payment of the \$100,000 in medical and rehabilitation expenses. The family will also look to a government program for the purpose of supplementing its income during the two-year recovery period. The total cost to government could be around \$120,000. The family members, who under the tort system recover approximately \$70,000 to compensate them for pain and suffering, back wages and inconvenience, receive nothing for any of these items under Professor Palmer's proposal.

The "tort reforms" currently pending in many legislative bodies across the country, including Congress, are bad enough. Professor Palmer's ultimate "reform" is even worse, at least from the perspective of negligence victims. There is simply no reason why the entire risk and loss should be shifted from the wrongdoers to the victims and government. Put simply, only wrongdoers benefit from Professor Palmer's proposal.

As stated earlier, Professor Palmer believes that the New Zealand experience demonstrates that the lingering influence of the present tort system will forever hinder true and meaningful reform. Therefore, the beast must be slaughtered. This is based on his perception that the New Zealand system has not achieved what he hoped it would. Another lesson that might be learned from the New Zealand experience is that the workers' compensation model adopted there is a dismal failure and was doomed from the beginning because it unfairly tips the balance in favor of wrongdoers. If one accepts the latter lesson, then the continuing influence of the common law in New Zealand can be explained by its citizens' refusal to abandon their basic sense of fairness and justice. Maybe Professor Palmer seeks to slaughter the wrong beast.

## THE EDWARD A. SEEGERS LECTURE

The late Edward A. Seegers, a former Chicago attorney, was uncommonly faithful and generous in his extended support of Valparaiso University. Through the years he made significant contributions for scholarships and new buildings, and most recently fully endowed a chair—Valparaiso University's first—in honor of his father and mother, Louis and Anna Seegers.

Valparaiso University demonstrated in several ways its profound gratitude to Mr. Seegers. It made him an honorary member of the Alumni Association and, in 1964, awarded him the Lumen Christi medal. He is one of only eighteen recipients of the medal since it was first awarded in 1950. Most recently, the University established the Edward A. Seegers Lectures in his honor.

Previous Seegers Lectures have been delivered by Thomas L. Shaffer, Washington and Lee University (1982); Harold J. Berman, Harvard Law School (1983); Neil MacCormick, University of Edinburgh (1985); Eugene V. Rostow, National Defense University (1986); Quintin Johnstone, Yale Law School (1988); William L. Twining, University College, London (1989); Robert S. Summers, Cornell University Law School (1990); Mark V. Tushnet, Georgetown University Law Center (1992); Richard D. Parker, Harvard Law School (1992); Alfred W. Meyer, Valparaiso University School of Law (1993); the Honorable Vivien Sue Shields, Indiana University School of Law (1993); Derrick Bell, New York University School of Law (1995).

In February, 1995, professor Derrick Bell presented the twelfth Seegers Lecture. Following a distinguished career devoted primarily to Civil Rights, Professor Bell joined the Harvard Law School faculty in 1969 and became its first blacked tenured member in 1971. Professor Bell left Harvard in 1980 to become dean at the University of Oregon law school. He returned to Harvard in 1986, but ended his association with the school in 1992 after a dispute over Harvard's commitment to hiring minority women professors. Since then, professor Bell has been a visiting professor at the New York University School of Law.

