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Serious Tort Reform Isn't: A Critique of Professor Sugarman's "Serious Tort Law Reform"

HARRY M. SNYDER*

A reply to Professor Sugarman.

INTRODUCTION

Professor Stephen D. Sugarman's call for "serious tort reform" is not serious. A serious proposal would be based on an objective analysis of facts and policy. Professor Sugarman's article, however, relies both on assertions of subjective bias and on premises that are contradicted by current data. If implemented, Professor Sugarman's proposal actually would lead to an increase in the number of persons injured every year because there would be no adequate deterrence for unsafe conditions or actions. Moreover, the plan threatens to leave the unemployed and non-wage earners uncompensated for real losses while it engenders no real dollar savings and deters whatever real reform might otherwise be needed.

In his article *Serious Tort Law Reform*, Professor Sugarman proposes transferring the responsibility to compensate small and moderate accident injuries to an expanded employee benefit and social insurance system.¹ Cases involving long-term disabilities or serious

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1. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795, 808-18 (1987).

disfigurements would continue to be resolved through the tort system or through workers' compensation. Any other injury, however, would fall into the provisions of Professor Sugarman's tort scheme. With the aim of making tort law function more as a compensation plan, Professor Sugarman proposes the following: (1) limit pain and suffering damages to victims who have suffered a long term disability, or serious disfigurement or impairment, and cap pain and suffering awards at \$150,000; (2) abolish the collateral source rule; (3) eliminate the right of a jury to determine the amount of punitive damages; and (4) limit plaintiff attorneys' contingency fees.² These proposed reforms are based on a series of faulty premises that significantly weaken the credibility of Professor Sugarman's argument.

Current Data Contradict Claims that Tort Reform Will Reduce Insurance Costs

Professor Sugarman presumes that his tort reform measures will reduce the cost of liability insurance. Under his plan, Professor Sugarman claims that funding of a temporary disability insurance program (TDI) and employee health benefits by employers will be feasible due to the savings that would result from the reduction in liability insurance premiums.³ Yet Professor Sugarman neglects to show where these savings would come from, how much they would be, or when they might begin. Furthermore, current data offer no support for the proposition that such savings would result from implementation of his proposal. Despite expectations that similar tort law changes enacted in 1986 would lower insurance costs, the insurance industry now asserts that the changes will not reduce rates.⁴

For example, a recent study commissioned by the Insurance Services Office (an industry trade organization) concluded that most of the tort law changes enacted nationwide last year will have no effect on insurance rates.⁵ After polling approximately 1200 insurance adjusters on the probable effect that recently enacted state tort changes would have on insurance company payouts, the researchers found that "the impact of the [tort] changes generally ranged from margi-

2. *Id.* at 819-38. Professor Sugarman also proposes eliminating any effect contributory or comparative negligence currently has on the amount a victim recovers. For a summary of his plan, see *id.* at 838-40.

3. See Sugarman, *supra* note 1, at 843.

4. Experience from the 1986 Proposition 51 campaign in California is a perfect example of this phenomenon. One year after the passage of Proposition 51, no appreciable improvement has resulted either in the availability or affordability of liability insurance. See Wolinsky, *Nader Assails Deep-Pockets Initiative as 'Hoax' on Public*, L.A. Times, June 5, 1987, at 3, col. 4.

5. See INSURANCE SERVICES OFFICE, CLAIM EVALUATION PROJECT (1987).

nal to imperceptible."⁶ Specifically, the insurance adjusters estimated that limitations on punitive damages and plaintiff attorneys' contingency fees, two of the reforms recommended by Professor Sugarman, would have no effect on insurance company payouts in six hypothetical cases.⁷

Insurance companies in Florida conducted a study on the expected impact of tort law changes on their cost of doing business. The study reached similar conclusions: the reforms would have marginal impact or none at all. As part of a 1986 tort reform package, the Florida Legislature passed an offset of collateral sources of compensation and limitations on noneconomic damages⁸ — two measures that Professor Sugarman advocates. Aetna Casualty and Surety Company — one of the largest insurance companies in the country — reported that the new tort law would have no effect on bodily injury claims costs.⁹ In fact, instead of lowering premiums after the enactment of the tort reform measures, Aetna raised premiums by 17.2%.¹⁰ Similarly, St. Paul Fire and Marine Insurance Company reported that the Florida tort changes would have only a "very small" impact on medical professional liability: "[T]he noneconomic cap of \$450,000, joint and several liability on the noneconomic damages, and mandatory structured settlements on losses above \$250,000 will produce little or no savings to the tort system as it pertains to medical malpractice."¹¹

The consequences of failing to achieve cost savings will be a repetition of the current insurance crisis. That, in turn, will lead to cries for very serious tort reform, and more studies.

6. *Id.* at 4.

7. *Id.* The insurance adjusters estimated that insurance industry payouts would be reduced if a cap on pain and suffering damages and a mandatory set-off in all cases of collateral benefits were enacted nationwide. Because these reform measures would at the same time substantially reduce any deterrent effect of tort, however, the potential savings in liability insurance costs does not provide a strong argument for their adoption. Moreover, it is unclear why nationwide enactment of these measures would reduce insurance costs when statewide enactment has not.

8. Tort Reform and Insurance Act of 1986, 1986 Fla. Sess. Law Serv. 86-160 (West).

9. Rate Revision Request, Report on Bodily Injury Claim Cost Impact of Florida Tort Law Change (Aug. 8, 1986) (filed with Florida Insurance Commissioner B. Gunter). See also WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE, THE CONFERENCE BOARD REPORT NO. 893 18 (1987).

10. Aetna Casualty & Surety Ins. Co., Filing with the Florida Department of Insurance (August 8, 1986).

11. Filing with the Florida Department of Insurance, St. Paul Fire and Marine Ins. Co., St. Paul Mercury Ins. Co., Medical Professional Liability, Addendum 1.

Studies Contradict Professor Sugarman's Claim that Victims Receive Excessive Awards in a Tort System "Lottery"

Professor Sugarman characterizes the tort system as one in which a few "lucky" victims "win the lottery" and go home with excessive awards.¹² However, evidence shows that judicial awards for damages sustained under a tort theory are both consistent and reasonable. According to a 1987 report by the Rand Corporation, changes in the size of personal injury awards are not due to lucky spins of the lottery wheel; instead, they are a response to technological, social, and economic changes in society, "to new legal rules and procedures, new attorney and client strategies, evolving community standards, and general social and economic change."¹³ The report also reveals that the tort system provides consistent compensation for a victim whether the case is heard in a rural or urban court, in California, or anywhere in the nation.¹⁴ Far from being the lottery system gone wild that Professor Sugarman describes, tort is evolving to keep up with a rapidly changing society like a common law system should.

Professor Sugarman's characterization of tort as a lottery providing excessive awards is weakened further by his use of studies that do not take into account post-trial adjustments of jury verdicts.¹⁵ A 1987 study reveals that the current tort system already has a mechanism for reducing excessive awards and that the system is working.¹⁶ According to the Rand Study, about 20% of all verdicts are reduced, and the average amount paid to victorious plaintiffs is only 71% of the original jury award. Furthermore, the bigger the verdict, the greater the chance it will be reduced as a result of post-trial motions, appeals or negotiation.¹⁷ The dynamics of these post-trial activities and the resulting effect on jury awards seem to undermine Professor Sugarman's argument that limitations on awards are urgently needed. As the Rand researchers point out, "[i]n ignoring the effects of post-trial processes already in place, critics are passing judgment on the current system before fully evaluating it."¹⁸

12. See Sugarman, *supra* note 1, at 796, 800.

13. M. PETERSON, CIVIL JURIES in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois (Rand Corp. Inst. for Civ. Just. 1987).

14. See *id.* at v-xii. The study reached similar findings in many jurisdictions. Median jury awards in urban centers were found to be similar to median awards in small cities and rural counties. Business and contract cases were found to comprise a significant proportion of all trials, even in rural areas.

15. See Sugarman, *supra* note 1, at 800 n.12.

16. M. SHANLEY AND M. PETERSON, POST-TRIAL ADJUSTMENTS TO JURY AWARDS (Rand Corp. Inst. for Civ. Just. 1987) [hereinafter JURY AWARDS].

17. *Id.* at 27. The study found that 33% of jury verdicts in excess of \$1 million were reduced, while 40% of verdicts in excess of \$10 million were reduced. Only 10% of awards less than \$100,000 and 20% of awards between \$100,000 and \$1 million were reduced.

18. *Id.* at vi.

Professor Sugarman proposes that the judge, rather than the jury, determine the size of any punitive damage award, because "the awarding of punitive damages, at least by juries, is now out of control."¹⁹ In advocating this change, Professor Sugarman relies entirely on subjective criteria and concludes that punitive damages are currently excessive, and that a judge is inherently a "better" decision-maker than a panel of jurors. Objective data contradict both assumptions. First, punitive damage awards do not occur frequently. Only one to three percent of plaintiffs are awarded punitive damages.²⁰ Second, a 1987 study on jury performance indicates that "judges may not necessarily be better decision makers than individual jurors;"²¹ the study portrays jurors not as lottery spinners, but as individuals who take seriously their responsibilities to award compensation and to deter unsafe behavior.

Moreover, Professor Sugarman would have his readers believe that juries act without supervision. This is not the case. Judges and the appeals process presently act as final checks on allegedly excessive punitive damage awards.²² The present system uses both jury and judicial decision making to maximize the likelihood of a fair and just result.

Professor Sugarman finds it "troublesome" that large corporations run the highest risk of having large punitive damage awards assessed against them.²³ But punitive damages are particularly well suited for large corporations which cannot be imprisoned and often cannot be disciplined in any other way. The threat of punitive damages — a large lump sum payment based on the company's particular financial situation rather than the size or cost of the injury — acts to deter gross misconduct of profit-seeking corporate managers and decision makers. Professor Sugarman finds it "highly inappropriate" that "innocent shareholders" bear the brunt of the punishment.²⁴ However, since it is in pursuit of profits for shareholders that excesses occur,

19. See Sugarman, *supra* note 1, at 830.

20. M. PETERSON, S. SARMZ & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (Rand Corp. Inst. for Civ. Just. 1987).

21. M. SELVIN & L. PICUS, THE DEBATE OVER JURY PERFORMANCE (1987). The study reveals both the lack of consensus on a standard for evaluating jury performance and the difficulty of applying any particular standard to measure the fairness of a civil jury verdict.

22. See JURY AWARDS, *supra* note 16, at 36. When verdicts included punitive damages, only 57% of the jury award was paid. In contrast, 82% of the amount was paid in cases involving only compensatory damages.

23. See Sugarman, *supra* note 1, at 832.

24. *Id.*

only the shareholders can hold management accountable for its actions and thereby minimize the likelihood of unsafe corporate activity. Therefore, the threat of a punitive damage award creates an incentive for management to act responsibly to protect its consumers as well as its shareholders.

Evidence Contradicts Professor Sugarman's Claim that the Tort System Does not Deter Unsafe Behavior

Professor Sugarman confines his discussion of tort as a deterrent to a footnote, claiming "a lack of evidence" exists to support the argument that tort plays a role in promoting safe conduct.²⁵ A 1987 study released by the corporate-funded Conference Board, however, directly contradicts Professor Sugarman's presumption that tort does not deter unsafe behavior.²⁶ In fact, the researchers concluded:

the impact of the liability issue seems far more related to rhetoric than to reality. Given all the media coverage and heated accusations, the so-called twin crises in product liability and insurance availability have left a relatively minor dent on the economics and organization of individual large firms, or on big business as a whole.²⁷

The Conference Board study, which polled the risk managers of 232 major U.S. corporations,²⁸ concluded that product liability has had a notable impact on the quality of products although it has had only a minor impact on the ability of the corporations to conduct business.²⁹ The study indicates that liability suits have "motivated management to positive actions: for example, improving product safety, product use and warning labels, and manufacturing quality."³⁰ Rather than preventing companies from developing and introducing products as Professor Sugarman claims,³¹ tort ensures that the manufacturers have an incentive to introduce safe products.

Facts and Studies Contradict Professor Sugarman's Claim that His Proposal Will Compensate All Victims Sufficiently

Although the major goal of Professor Sugarman's proposal is to provide all victims with full compensation, his reforms would prevent many victims from receiving sufficient compensation, create more

25. *Id.* at 801 n.13.

26. See WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE THE CONFERENCE BOARD REPORT NO. 893 (1987).

27. *Id.* at 2.

28. The corporations involved in the study each have an annual minimum sales revenue of 100 million dollars and represent a range of U.S. manufacturing and nonfinancial service firms. *Id.* at 2.

29. The study indicates that product liability has had minimal impact on revenues, market share, and employee retention. *Id.* at 2.

30. *Id.* at 21.

31. See Sugarman, *supra* note 1, at 795.

victims by removing provisions in the law that punish wrongdoers, and remove incentives for safe behavior.

By falling short of a national health plan that would cover the medical needs of all victims, Professor Sugarman's proposal foregoes many of the advantages it aims to achieve. The proposal discriminates against those who are not wage-earners and, therefore, fails to compensate a large segment of the population. Professor Sugarman's proposal not only fails to address the needs of the unemployed for coverage of accident-related medical costs and loss of potential earning power — needs which are inadequately met by our current unemployment insurance system — but also it fails to cover non-marketplace workers for loss of imputed income. For example, under Professor Sugarman's system an injured housewife would not receive the compensation she could receive under the current tort system for the cost of hiring replacement housecleaning, childcare, and other services.

Even many wage-earners who *are* covered by Professor Sugarman's proposal would not receive sufficient compensation because of the arbitrary ceiling he places on pain and suffering awards. Professor Sugarman recognizes that "dollars have symbolic value in individualistic, capitalistic America,"³² but he fails to recognize that in addition to symbolically soothing the victim's feelings of loss and outrage, general damages also provide funds for whatever physical comforts and accommodations can be arranged to improve the victim's quality of life. The traumas for which pain and suffering damages are awarded are substantial, often tragic, and still deserve the full compensation they have received since the common law first acknowledged claims of pain and suffering over 100 years ago.

Moreover, placing a cap on pain and suffering damages discriminates against those who are most seriously injured. The most seriously injured individuals will be the least compensated under this proposal since victims with damages lower than the \$150,000 cap may be fully compensated, while victims with more extensive injuries will be denied full compensation.

A limit on pain and suffering damages will result in incomplete compensation to some victims, and seriously reduce the potential liability and punishment would-be wrongdoers will face. When the amount of money that an unsafe actor must pay is reduced, and fewer injured victims bring suit, there will be a corresponding de-

32. *Id.* at 826.

crease both in the incentives businesses face to manufacture safer, improved products and in the incentives for individuals and institutions to behave safely. The presence of a damage award cap changes a company's cost/benefit analysis concerning whether to market a product with a known defect or to improve the product.³³ To these companies, limiting damage awards to \$150,000 and removing any possible liability for injuries that disable a victim for less than six months significantly lessen the risk of marketing a potentially defective product.³⁴

Studies Contradict Professor Sugarman's Assumption that Limiting Plaintiffs' Attorneys' Contingency Fees Will Help Plaintiffs

The deterrent effect of the tort system will be further reduced by Professor Sugarman's proposal to limit attorneys' contingency fees. These limits will reduce both the number of plaintiff lawyers willing to represent victims and the suits victims will be able to bring. A Rand analysis discovered that restrictions on a contingency fee would "produce a suboptimal investment in litigation and hence suboptimal deterrence and compensation."³⁵ Professor Sugarman himself recognizes that a reduced fee percentage for the plaintiffs' lawyer may have some effect on the lawyer's zealotry;³⁶ however, he does not acknowledge that many plaintiffs' lawyers, presumably the more able, may abandon this line of work and turn to other areas of practice in which fees are not limited. As Professor Sugarman stresses in his article, the quality of the lawyer representing a victim has a significant effect on the outcome of a case.³⁷ Therefore, a fee limitation would reduce not only the quantity and quality of lawyers representing victims, but also the victim's chances for full recovery. Fewer successful suits would reduce the incentive to produce safe products, to engage in safety practices, and to behave responsibly.

Professor Sugarman's goal of speeding up the litigation process and reducing its overall cost would be better served by imposing limitations on *defense* attorneys' fees — they are paid on an hourly basis and, therefore, have incentive to engage in frivolous or delaying

33. Ford's decision to manufacture the Pinto is an example of corporate decision-making that weighed profit against safety and chose cost-effectiveness over saving lives.

34. We should not overlook the reality of the use and need for general damage awards. Although not usually discussed, general damages often provide the source of plaintiff attorneys' fees. This allows special damages to be saved for their intended use — compensation. Without pain and suffering awards, many plaintiffs will not be made whole for their out of pocket economic loss.

35. P. DANZON, CONTINGENT FEES FOR PERSONAL INJURY LITIGATION vii (Rand Corp. Inst. for Civ. Just. 1980).

36. Sugarman, *supra* note 1, at 836.

37. *Id.* at 796, 826.

tactics. A policy analyst for the Heritage Foundation, writing in the *Wall Street Journal*, noted: "[P]aying lawyers by the hour creates an enormous conflict of interest between lawyers and their clients. For the hourly fee lawyer, the longer the case goes on, the more money he will get. Every pleading, motion, deposition and delay will mean more money for him; regardless of whether it leads to a better result for the client. Thus, from the standpoint of the client, as well as general court efficiency, reformers should actually be trying to encourage the contingent fee, not limit it."³⁸

CONCLUSION

Whatever your analysis of the effectiveness of today's tort system happens to be, a good tort system — and therefore any serious tort reform proposal — must provide for the following: (1) punishment of wrongdoers; (2) incentives for safety; and (3) sufficient and efficient compensation of victims. Professor Sugarman's proposal does not offer a practical solution for tort reform because, although it may compensate *some* victims more efficiently than the present system, it leaves many victims uncompensated, fails to punish wrongdoers, and fails to provide incentives for safe behavior.

Professor Sugarman has missed an opportunity to address a complicated problem in an objective manner. His unexamined biases favor judges over juries, innocent shareholders over the innocently injured, insurance company attorneys over plaintiff attorneys, and the employed over the unemployed and non-wage earners. He has ignored current data which show that tort law promotes safe conduct, that juries and judges work together to obtain equitable results, and that his proposed reforms will not result in any cost savings. One cannot make a proposal serious by calling it serious.

Our tort system needs to be objectively reviewed to determine where its problems lie. Only then can we craft solutions which improve rather than weaken our system. For those interested in serious tort reform, a vacuum remains to be filled.

38. Gattuso, *Don't Rush to Condemn Contingency Fees*, *Wall St. J.*, May 15, 1986, at 28, col. 3.

