

Defining the Agenda for Serious Tort Reform

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A reply To Professor Sugarman.

THE NEED FOR IMMEDIATE REFORM

After a thoughtful and comprehensive review of the current tort system, Professor Stephen D. Sugarman concludes that "serious reforms" are necessary to restore fairness and reason to our system of civil justice. Lawyers for Civil Justice¹ agrees.

As Professor Sugarman ably demonstrates, the tort system of the 1980s has come to resemble a lottery,² in which a few lucky litigants recover enormous windfalls and others are not even compensated for out-of-pocket losses.³ Increases in damage awards have far outstripped the inflation rate and they rationally relate less and less to the injuries involved and defendants' responsibility for those injuries.

Many of the deficiencies Professor Sugarman identifies resulted

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1. Lawyers for Civil Justice is a coalition of corporations, individuals and associations interested in reducing unnecessary litigation costs arising from the abuse of existing litigation procedures and statutes.

2. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987).

3. For example, according to a Rand Corporation study, cases with million dollar awards accounted for only 8% of all money awarded in San Francisco courts in the 1960s. By the early 1970s, 30% of all money awarded to plaintiffs was received in cases with verdicts over one million dollars. By the late 1970s, the figure had reached almost 50%. In the 1980s it had increased to almost 66%. G. SHUBERT, CHANGES IN THE TORT SYSTEM: HELPING INFORM THE POLICY DEBATE 2 (Rand Corp. Inst. for Civ. Just. 1986).

from revolutionary judicial extensions of tort law. Consider, for example, the legal prerequisite for imposing liability. Historically, tort law was based on the notion of fault: a defendant could only be required to pay damages if the plaintiff established that his injury resulted from defendant's wrongful conduct. More recently, courts have developed principles holding defendants liable in the absence of any finding of fault.⁴ A second area in which courts have rewritten the law of torts concerns joint and several liability. Originally, that doctrine allowed a court to impose liability on one defendant for the actions of another defendant only if the two defendants had engaged in concerted action against the plaintiff. More recently, courts have applied joint liability to make virtually any defendant with the resources to qualify as a "deep pocket" liable for damages caused by other defendants, regardless of the absence of concerted action.⁵

The consequences engendered by those and other radical changes in tort law became most visible in recent years as state and local governments, businesses, and professionals experienced drastic increases in premiums for liability insurance.⁶ As a result of these increases and insurers' reluctance to offer coverage in a growing number of fields perceived to have high risks because of the litigation explosion, numerous entities were forced to operate without insurance or with only limited coverage.⁷

As Professor Sugarman indicates, however, the problems posed by changes in traditional tort principles transcend the recent difficulties regarding liability insurance.⁸ Ultimately the problem that must be addressed is not insurance reform, but the abiding need to restore fairness to the civil justice system.

Having succeeded in defining the problem, Professor Sugarman turns to advancing his own recommended solutions. Three of his recommendations are especially noteworthy and deserving of support: 1) assigning to judges rather than jurors the responsibility to determine the propriety of an award of punitive damages;⁹ 2) placing limits on awards for noneconomic losses, such as pain and suffering awards;¹⁰

4. See, e.g., *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

5. See *infra* text accompanying notes 31-47.

6. A 1986 Justice Department report surveying the effect of the insurance crisis on various sectors of the U.S. economy found municipalities experiencing premium increases of as much as 400% architects and engineers paying 200% to 300% more, and manufacturers experiencing increases of 40% to 300%. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 8-12 (1986) [hereinafter DOJ REPORT]

7. *Id.* at 14-15, 45-52.

8. See Sugarman, *supra* note 2.

9. *Id.* at 830.

10. *Id.* at 825.

and 3) reform of the collateral source rule.¹¹ Lawyers for Civil Justice supports each of these initiatives.

Punitive Damages

In recent years there has been an enormous surge in the number and size of punitive damage awards. For example, although only one reported appellate decision before 1970 upheld an award of punitive damages in a product liability action, appellate courts now regularly affirm awards in excess of \$1 million in such cases.¹² As one commentator has concluded, punitive damages are now "awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago."¹³ The prospect of a large award of punitive damages has been called "the pot of gold at the end of the rainbow . . . that motivates plaintiffs and their counsel to go to trial" and makes it more difficult to settle cases.¹⁴

To restore rationality to the law of punitive damages, judges should take a greater role in such determinations. Courts are better equipped than jurors, for example, to select an amount that will serve the purposes of a punitive award without unduly punishing a particular defendant. This is especially true in cases involving corporate defendants, cases in which jurors have difficulty evaluating the wealth of institutional manufacturers or product sellers and may be biased against any defendant perceived to have substantial resources.¹⁵ Moreover, this change would ensure that jurors do not consider evidence of a defendant's financial position — evidence which is relevant to determining the amount of punitive damages but irrelevant and prejudicial in deciding the threshold question of liabil-

11. *Id.* at 819.

12. See Birnbaum & Wheeler, *Punitive-Damages Law Paves Way for Massive Design-Defect Awards*, NAT'L L.J., Nov. 17, 1986, at 40, col. 1; Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 271 n.6 (1983).

Similarly, a Rand Corporation study of all types of litigation in Cook County, Illinois, found that the total amount of punitive damage awards had increased by 700% during the 1980s. *Product Liability Voluntary Claims and Uniform Standards Act: Hearings on S. 1999 Before the Senate Subcommittee on the Consumer of the Committee on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 82 (1986) (statement of Deborah R. Hensler, The Institute for Civil Justice, Rand Corporation).

13. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 133 (1982).

14. *Recent Developments in Tort Law Reform*, 39 BUS. LAW. 209, 238 (1983) (comments of A. Whittemore).

15. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 45-49 (1982).

ity — in deciding whether any punitive damages are warranted.¹⁶

Additional reforms also should be enacted to control the spiraling increases in punitive damage awards. First, the level of proof required to impose punitive damages should be increased to a showing of at least “clear and convincing evidence.”¹⁷ Second, the substantive standard governing punitive damages claims should be clarified to insure that such awards are limited to cases where a defendant’s conduct manifests a malicious and reckless disregard for the safety of those persons who might be harmed and constitutes an extreme departure from accepted standards of conduct.¹⁸ Finally, legislatures and courts should require that punitive damage awards be reasonably related to the amount of actual damages suffered.¹⁹ Although Professor Sugarman may be correct in submitting that these changes may prove to have less significance than assigning judges the primary role in making punitive damage determinations,²⁰ these steps are worthwhile reforms nonetheless.

Noneconomic Damages

The second factor contributing most heavily to the dramatic increase in the size of jury awards is the rapid escalation in awards for noneconomic damages. Although intended to be compensatory,

damages for pain and suffering are not compensation in any ordinary sense that they make the plaintiff whole or replace what has been lost, since the damages are not pecuniary and since there is no market in pain and suffering by which the damages could be estimated.²¹

In the absence of any objective standard that jurors can utilize to make such awards and that courts can employ in assessing jury verdicts, jurors have virtually unbridled discretion to award whatever amount they wish.²² Studies of trends in jury verdicts indicate that

16. See S. REP. NO. 476, 98th Cong., 2d Sess. at 56-57 (1984).

17. A number of jurisdictions have adopted this reform by statute or judicial decision. See, e.g., *D&T Sanitation, Inc. v. State Farm Mut. Auto. Ins. Co.*, 443 N.E.2d 1207 (Ind. Ct. App. 1983); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980); MINN. STAT. ANN. § 549.20 (West Supp. 1983); OR. REV. STAT. § 30.925 (1981).

18. Current standards utilized by many courts are so vague that a defendant can be required to pay punitive damages in virtually any case in which a design defect is found. See generally *Birnbaum and Wheeler*, *supra* note 12.

19. Although some jurisdictions recognize this requirement, many do not. Compare *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 377 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481 (3d Cir. 1985), with *Carroll Kenworth Truck Sales, Inc. v. Leach*, 396 So. 2d 1044, 1046 (Ala. 1981). Absent such a requirement, virtually any case can give rise to multi-million dollar exposure. For example, in *Lavoie v. Aetna Life & Casualty Co.*, 470 So. 2d 1060 (Ala. 1984), *vacated and remanded on other grounds*, 106 S. Ct. 1580 (1986), an insurance company which failed to pay a \$1650.22 bill was initially ordered to pay \$3.5 million in punitive damages.

20. Sugarman, *supra* note 2, at 833-34.

21. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 545 (1973).

22. 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS, 563-64 (2d ed. 1986).

in recent years jurors have awarded dramatically larger amounts for pain and suffering.²³ The open-ended nature of noneconomic damages creates vast unpredictability in the tort system and presents a significant obstacle in the settlement process and in the setting of insurance rates.

Recognizing the problems posed by open-ended liability for noneconomic damages, a number of state legislatures recently have enacted legislation placing limitations on such damage awards in all tort actions.²⁴ Similarly, California enacted legislation limiting the amount of noneconomic damages that can be awarded in medical malpractice cases to \$250,000.²⁵ Lawyers for Civil Justice supports legislation to place reasonable limits on noneconomic damages in all personal injury cases. Because of the lack of objective standards by which noneconomic damages might be measured, it is entirely appropriate for legislatures to set bounds by statute within which juries can make such awards. Whether limits are established as a fixed amount per injury or occurrence, as Professor Sugarman recommends,²⁶ or tied to economic losses by allowing a specified percentage of such damages, ceilings on recovery of noneconomic losses would assure that such damages are more closely related to actual losses and that equity among claimants is maintained.

Collateral Source Rule

A third element of a sound tort reform program is modification of the collateral source rule. That rule prohibits judges and juries from receiving evidence that a plaintiff in a tort action has already received compensation for injuries claimed in the litigation from other sources. It thus permits a plaintiff to obtain a windfall of double or triple recovery for the same loss. For example, a plaintiff in a tort action who has already been "paid his salary . . . during disability,

23. As noted in a Justice Department report, the percentage rate of increase for large verdicts has been far higher than for small or medium size verdicts. DOJ REPORT, *supra* note 6, at 39. The most significant factor distinguishing large verdicts from small or medium-sized verdicts is that large verdicts consist of disproportionately higher amounts for noneconomic damages. *Id.* For example, one study of Florida malpractice cases found that noneconomic damages represent only 27% of awards between \$100,000 and \$200,000, while the noneconomic share increases to 54% for awards above \$600,000. H. MANNE, MEDICAL MALPRACTICE POLICY GUIDEBOOK 138-39 (1985).

24. See ALASKA STAT. § 09.17.010 (1986); COLO. REV. STAT. § 13-21-102.5 (1986); FLA. STAT. § 768.80 (1986); HAW. REV. STAT. § 663 (1986); N.H. REV. STAT. ANN. § 227.13 (1986); WASH. REV. CODE § 301 (1986).

25. See CAL. CIV. CODE § 3333.2 (West 1986).

26. Sugarman, *supra* note 2, at 825.

or had his medical expenses or other losses paid for by another, or out of the proceeds of an accident or other insurance policy," may still recover full damages for these same items from a defendant who is liable for the injury.²⁷

The fundamental purpose of the tort system is to compensate plaintiffs for their losses in order to make them whole — neither better nor worse off than if the loss had not occurred. By permitting a claimant who has already received workers' compensation, payments from disability and medical insurance, or other collateral sources to receive an award for these same losses in court, the rule allows the plaintiff to receive more than full compensation. The cost of this double payment is passed on to consumers in the form of higher prices for products, higher taxes, and higher insurance premiums.

Stripped of its original rationales by developments in the law,²⁸ the rule operates as a form of punishment by requiring some defendants to pay damages beyond those required to make the plaintiff whole. Yet, unlike punitive damages, the collateral source rule draws no distinction among defendants based on the degree of fault: liability for these extra damages is determined not by whether the defendant acted intentionally or negligently but rather whether the plaintiff is eligible for payments from collateral sources. Recognizing this anomaly, several jurisdictions have moved in recent years to abolish or limit the rule.²⁹

27. 4 F. HARPER, F. JAMES & O. GRAY, *supra* note 23, § 25.22, at 648-49 (footnote omitted).

28. Advocates of the collateral source rule traditionally relied on two rationales. First, they argued that it was unfair to take collateral sources into account in awarding damages because those sources were often financed by the claimant himself. Whatever the validity of this reasoning when the rule operated primarily to shield insurance payments financed by the claimant's own premiums, it no longer is persuasive in a time when the vast majority of collateral payments are paid by others. See DOJ REPORT, *supra* note 6, at 71.

The second justification frequently offered for the rule centers on notions of fault. Given a choice between allowing "innocent plaintiffs" or "wrongdoers" to benefit, it is often said that any windfall should go to the innocent plaintiff. See, e.g., Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958). This reasoning has been rendered obsolete, however, by changes in tort law allowing plaintiffs who are at fault to recover damages and subjecting defendants to liability for conduct that is less and less morally blameworthy. See 4 F. HARPER, F. JAMES & O. GRAY, *supra* note 23, § 25.22 at 656 (footnote omitted).

29. Florida recently enacted a statute requiring courts to deduct collateral payments from jury awards. FLA. STAT. § 768.76 (1986). Indiana enacted a statute allowing admission of evidence of payments from collateral sources financed by employers, such as workers' compensation or health benefits provided to employees, but retained the rule for other types of benefits. IND. CODE ANN. § 34-4-36 (Burns 1986). California has abolished the collateral source rule in negligence actions against health care providers. CAL. CIV. CODE § 3333.1 (West 1987). See also ALASKA STAT. § 09.17.070 (1986); COLO. REV. STAT. § 13-21-111.6 (1986); HAW. REV. STAT. § 663 (1986); MINN. STAT. § 80 (1986).

Like Professor Sugarman, Lawyers for Civil Justice supports reform of the collateral source rule to allow reduction of tort awards to reflect benefits received for identical losses. Thus, for example, if a jury awards a plaintiff damages in a tort action for which the plaintiff has already obtained compensation from any federal, state, or employer-financed program providing benefits for such losses, the judge presiding over the tort case should be required to subtract an amount representing the collateral payments from the tort award.³⁰

Joint and Several Liability

Although he touches on many of the leading tort reform proposals, Professor Sugarman omits consideration of one proposal that has been the subject of considerable legislative and judicial attention: modification of joint and several liability principles. As currently applied in the majority of jurisdictions, that doctrine operates to render any defendant who is at all responsible for a plaintiff's injury fully liable for damages attributable to the conduct of other defendants as well as his own conduct. In practical terms, this means that a plaintiff can collect an award from the defendant with the most money — the so-called "deep pocket" — rather than the defendant with the greatest culpability.

It is simply unfair to require a partially responsible party to pay damages caused by others. This inequity is illustrated by any number of recent cases applying this deep pocket rule.³¹

Joint and several liability initially was developed to penalize defendants who conspired to engage in a wrongful act together. As an early English case explained, "[with] all coming to do an unlawful act, and of one party, the act of one is the act of all . . ."³² Thus, where defendants engaged in a "concert of action," each was held entirely liable for all damages as each was considered equally at fault.³³

Subsequent decisions have expanded this principle beyond its original rationale of equal fault by holding defendants individually liable

30. Of course, to insure that defendants in tort actions do not receive an unfair advantage from this change, any defendant benefiting from such a reduction would lose any common law lien it might have on the collateral payments.

31. See, e.g., Green, *In the Balance: A Lawyer Faces Risks In Deciding to Take On Costly Damage Suits*, Wall St. J., May 23, 1986, at 1, col 1; Granelli, *The Attack on Joint & Several Liability*, 71 A.B.A. J. 61 (July 1985).

32. *Heydon's Case*, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613) (quoted in 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 22, § 10 at 1.

33. See S. REP. NO. 422, 99th Cong., 2d Sess. 68 (1986).

for harm caused by other defendants where a plaintiff is the victim of independent, separate, but concurring tortious acts of two or more persons.³⁴ In other words, this extension of joint and several liability treats defendants as having acted jointly, even though there is no cooperative behavior that would make it proper to treat the conduct of each as the conduct of the others. In contrast, English courts, the first to impose joint and several liability, have maintained the traditional common law basis for the doctrine by refusing to recognize such liability in the absence of concerted action.³⁵

Extension of joint and several liability from the realm of concerted action resulted from a failure to distinguish procedural and substantive considerations. At common law, notions of procedural joinder and joint and several liability were coterminous: "only those tortfeasors could be joined as defendants who were jointly and severally liable under substantive law."³⁶ As modern procedural reforms were adopted permitting joinder in a single law suit of all persons whose conduct may have contributed to a plaintiff's injury, rather than only those tortfeasors who acted jointly, courts assumed that joint and several liability should be expanded to reflect the procedural change.³⁷ In doing so, these courts failed to recognize that the procedural innovations were not intended to alter substantive law but only to promote trial convenience.³⁸

It is a fundamental principle of our legal system that a person is held responsible only for the consequences of his own improper actions. Joint liability dissolves this essential connection between causal responsibility and liability by allowing a person who is only partially responsible for a claimant's injury to be held responsible for damages caused by other defendants. This result is especially troublesome where the defendant who may pay the judgment is less at fault than the defendant escaping liability.

The result is even more bizarre in jurisdictions that apply joint liability principles in conjunction with comparative negligence principles. Although a plaintiff's own negligence was once an absolute bar to his recovery in a tort action, the vast majority of jurisdictions now have adopted more flexible comparative negligence principles permit-

34. See, e.g., *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 929 n.1 (5th Cir. 1982); *Buehler v. Whalen*, 70 Ill. 2d 51, 374 N.E.2d 460 (1977). The one exception recognized in such cases arises where the independent concurring acts have caused distinct and separate injuries to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 433A(1)(a), comment b, illustrations 1, 2 (1965).

35. 1 S. SPEISER, C. KRAUSE & A. GANS, *THE AMERICAN LAW OF TORTS* § 3:7, at 393 (1983).

36. 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 22, § 10.1 at 7 (footnote citing cases omitted).

37. *Id.* at 8-10.

38. *Id.* at 10.

ting plaintiffs who were partially at fault to recover at least a portion of their damages.³⁹ In these jurisdictions, a minimally responsible defendant may be held jointly liable for a judgment against multiple defendants even though he is less responsible for the plaintiff's injury than the plaintiff.⁴⁰ Ironically, the shift to comparative negligence principles was intended to allocate responsibility more fairly and proportionately than an all-or-nothing rule requiring a plaintiff with any fault to absorb all costs.⁴¹ Yet joint liability operates on a similar all-or-nothing basis to require a defendant with any fault to absorb all costs — failing to allocate responsibility fairly and proportionately among defendants.

The joint liability rule results in inclusion of many state and local governments and corporations as defendants in litigation in which their involvement is only tangential, in order to provide the plaintiff with a deep pocket that might subsidize more culpable defendants less able to pay.⁴² Because many governments and corporations are no longer able to obtain affordable liability insurance, taxpayers and consumers are often forced to pay the cost of this deep pocket liability through higher taxes, reduced services, and higher prices.

The deep pocket rule was a major contributor to the recent insurance crisis. Because insured entities frequently are required to pay damages attributable to the tortious acts of uninsured codefendants, liability insurance rates have skyrocketed. Moreover, the possibility of such liability is a source of tremendous uncertainty for insurers in setting premiums: because of joint liability, an insurer must calculate not only a rate that reflects the risk of insuring a particular entity, but also the risk generated by unseen and unknown entities that might be named as codefendants of the insured entity.⁴³

In recent years the trend of expanding joint liability has been re-

39. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1.1 (1986).

40. A recent report by a task force on tort reform appointed by Massachusetts Governor Michael S. Dukakis illustrated this point by presenting the following situation which could arise under Massachusetts principles of joint and several liability and comparative negligence: A plaintiff 40% responsible for his own injury sues two defendants — one who is responsible for 50% of the fault (Defendant A) and another for 10% (Defendant B). Under Massachusetts law, the plaintiff could recover from Defendant B 60% of the damages he suffered even though that defendant was responsible for only 10% of the fault and is thus less at fault than the plaintiff. *LIABILITY IN MASSACHUSETTS: TOWARD A FAIRER SYSTEM, REPORT OF THE GOVERNOR'S TASK FORCE ON LIABILITY ISSUES* 128-29 (1986).

41. AMERICAN COLLEGE OF TRIAL LAWYERS, *REPORT OF THE TASK FORCE ON LITIGATION ISSUES* 20 (1986).

42. DOJ REPORT, *supra* note 6, at 64.

43. See S. REP. NO. 422, 99th Cong., 2d Sess. 68 (1986).

versed, and a number of jurisdictions have moved to restore the doctrine to its original foundation.⁴⁴ Several states have adopted statutes abolishing or restricting joint liability in the absence of true concerted action among defendants.⁴⁵ In California, a statute limiting joint liability to a plaintiff's economic losses and rendering the doctrine inapplicable to such noneconomic losses as damages for "pain and suffering" was adopted by referendum.⁴⁶ Several other states have made similar changes by judicial decision.⁴⁷

Lawyers for Civil Justice supports abolition of joint liability (except in instances of concerted action) in order to restore fairness to the tort system. Joint liability is inequitable because it allows a defendant who is one percent responsible to be required to pay one hundred percent of plaintiff's damages. Abolition of joint liability would eliminate this inequity and restore the essential connection between the degree of causal responsibility and the amount of liability. Each party — including the plaintiff — should bear responsibility only for its contribution to an injury. The liability of all parties should be several only, except where the parties are found to have engaged in true concerted action.

STRATEGY FOR CHANGE

Although he supports capping noneconomic damages, restricting punitive damages, and reforming the collateral source rule, Professor Sugarman is critical of those who urge legislators to enact such changes without pressing for a more fundamental overhaul of the tort system. Professor Sugarman advances a thought-provoking and far reaching agenda of initiatives including temporary disability insurance, mandatory sick leave, and incentives for employer-financed health benefits. While acknowledging his support for more conventional reforms sought by "defense" advocates, he criticizes these advocates as reformers whose vision "is far too truncated."⁴⁸ Professor Sugarman thus makes clear that any disagreement he might have with the agenda advanced by these defense advocates centers on tactical, rather than substantive, considerations.

Professor Sugarman's proposals for sweeping changes in the basic tort and workers' compensation schemes, like those made by other

44. Barron, *Forty Legislatures Act to Readjust Liability Rules*, N.Y. Times, July 14, 1986, at 1, col. 1.

45. See ALASKA STAT. § 09.17.080 (1986); COLO. REV. STAT. § 13-21-111.5 (1986); CONN. GEN. STAT. § 52-572H (1986); HAW. REV. STAT. § 663 (1986); UTAH CODE ANN. § 78.27-39 (1986).

46. See CAL. CIV. CODE § 1431 (West 1986).

47. See *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978); *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

48. Sugarman, *supra* note 2, at 804.

academic advocates of no-fault and other regimes,⁴⁹ certainly are worthy of consideration. But until they are fleshed out further through comprehensive research and debate, they offer little prospect of short-term legislative change. Put simply, our disagreement with Professor Sugarman centers on our divergent assessments of just what is the realm of the possible. Professor Sugarman believes that absent a push for radical change, states are unlikely to enact any meaningful reforms. As advocates for tort reform in state legislatures, the members of Lawyers for Civil Justice have been successful in convincing legislators to make the kinds of meaningful changes⁵⁰ that Professor Sugarman predicts cannot be enacted.

Professor Sugarman's position as a law school professor affords him the opportunity to take a longer view and consider the ramifications of changes that, if not feasible today, may be feasible a decade from now. As entities on the firing line of the current tort system today, the members of Lawyers for Civil Justice simply do not have that luxury; they must instead concentrate efforts on that which can be achieved in the short term.

The difference in approach is best illustrated by our divergence from Professor Sugarman on the proper role of fault in the tort system. Professor Sugarman would further restrict the role of fault as a prerequisite for recovery. Indeed, he would even allow plaintiffs whose own negligence contributed to their injuries to recover for injuries resulting from such contributory negligence.⁵¹ In the absence of a demonstration that the more far reaching changes advocated by Professor Sugarman are administratively and politically feasible, Lawyers for Civil Justice advocates practical reforms to ensure that strict liability theories do not limit consideration of fault to such an extent as to convert strict liability into no-fault liability.

Until perhaps twenty years ago, fault was the central principle in our tort system: a defendant could be held responsible only for his own tortious acts. The emphasis on fault operated to place the cost of harm on the wrongdoer rather than others in society and to deter

49. See, e.g., O'Connell, *A "Neo No-Fault" Contract In Lieu Of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985).

50. A March 1987 Justice Department survey of tort reform initiatives in state legislatures reports that two-thirds of the states enacted tort reform legislation of some kind during 1986 and many adopted important limits on joint and several liability, noneconomic and punitive damages, and the collateral source rule. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 65-73 (1987).

51. Sugarman, *supra* note 2, at 839.

conduct that was likely to cause injuries to others.⁵²

In recent years, courts have begun to shift away from fault-based standards to legal principles that impose liability in the absence of fault.⁵³ The shift has been especially pronounced in cases involving product design and warning issues. For example, in *Beshada v. Johns-Manville Products Corp.*,⁵⁴ the New Jersey Supreme Court held that a manufacturer could be held liable for failure to warn of a danger that was scientifically undiscoverable at the time of the product's manufacture. The *Beshada* court defended this imposition of liability in the absence of fault by arguing that manufacturers and distributors could best allocate the costs of any injuries resulting from their products.⁵⁵ This approach, in effect, converts manufacturers and distributors into accident insurers.⁵⁶

The tort system's drift toward liability without fault often results in liability being imposed on defendants for conduct which was neither improper nor wrongful. A no-fault regime removes the incentive for manufacturers to increase the safety of their products since it renders them equally liable whether they use reasonable care in designing their products or not.⁵⁷ Finally, liability without fault contributes substantially to the unavailability of insurance and discourages innovation by encouraging businesses to avoid risk. Accordingly, there should be a return to standards of liability that include consideration of fault, particularly in product liability cases.

There are a number of situations in which consideration of the fault of the manufacturer would be appropriate. For example, if a product deviates from the manufacturer's own specifications, it could fairly be considered defective. And, where it is alleged that a product was improperly designed, liability should be imposed only if the manufacturer knew of the danger and failed to employ a reasonable and practical design.

Perhaps the best example of the fairness of requiring proof of fault is in matters involving the "state of the art" of product design. In such cases, a manufacturer should be held liable for a failure to provide adequate warnings only if the manufacturer knew or should have known, given the "state of the art" — that is, the level of pertinent scientific, technical and medical information — about the danger which allegedly caused the claimant's harm. Similarly, a manu-

52. W. P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 24-26 (5th ed. 1984).

53. DOJ REPORT, *supra* note 6, at 30-31.

54. 447 A.2d 539 (N.J. 1982).

55. *Id.* at 547.

56. See S. REP. No. 670, 97th Cong., 2d Sess. 6 (1982).

57. Robb, *The Effect of the Proposed Federal Product Liability Act on Current Law Regarding Liability for Defectively Designed Products*, 6 J. PROD. LIAB. 147, 169 (1983).

facturer should not be held liable for design or formulation of the product if the product conformed to state of the art manufacturing and engineering practices at the time the product left the manufacturer's control.⁵⁸ Put simply, it is easy to say, after the fact, that a manufacturer should have designed a product differently or provided a warning of a risk that since has come to light. But when the risk was unknown and no practical and technically feasible alternative design was available when the product left the manufacturer's control, the manufacturer should not be subjected to liability.

Such reforms would not restore a traditional negligence standard to product cases. Instead, they would establish a fault-based principle as an outer perimeter of strict liability. As respected legal scholars have pointed out, absent such a limitation, product liability law overreaches into the area of regulatory policy by empowering jurors to impose liability on manufacturers if the jurors believe, notwithstanding the manufacturer's having designed and labeled the product in accordance with the state of the art, that the product lacked sufficient social utility.⁵⁹

The law should also recognize limited defenses to product liability actions based on the claimant's own faulty conduct. For example, a manufacturer should not be liable for harm resulting from an unreasonable or unforeseeable use or alteration of the product. Similarly, a manufacturer should incur no liability where injury results from a defect or danger that would have been apparent to a reasonable person or from an inherent characteristic of the product that would be known to persons who ordinarily use or consume the product. Finally, a manufacturer should not be held liable if, at the time of injury, the claimant was intoxicated or under the influence of a drug, and that condition was fifty percent or more responsible for the event that gave rise to the injury. These reforms will encourage product users to take reasonable precautions and will act as strong incentives to reduce accidents on the highways and at the work place.

Fault traditionally has been the linchpin of our tort system. It provides a standard by which well-intentioned people may conduct their actions. By restoring fault as an outer perimeter of tort law, these reforms will ensure that persons are not held liable for conduct that

58. See, e.g., *Wiska v. St. Stanislaus Social Club, Inc.*, 7 Mass. App. Ct. 813, 390 N.E.2d 1133 (1979).

59. *Product Liability, 1987: Hearings on H.B. 235 and S.B. 102 Before the Senate Select Committee on Tort Reform of the Ohio Legislature*, 117th Gen. Assembly (April 9, 1987) (statement of Victor E. Schwartz, Partner, Crowell & Moring; Adjunct Professor of Law, U. of Cinn.).

is otherwise proper and blameless.

CONCLUSION

Professor Sugarman's article should be recommended reading for anyone not yet convinced of the unfairness and irrationality of the current tort system. He argues convincingly that reforms are necessary to restrict the runaway growth in punitive and noneconomic damages and to revise the outmoded collateral source rule. He also proffers a number of far-reaching proposals that should advance the debate over how to reform the tort system but about which no consensus yet exists.

Professor Sugarman's proposals, however, require more thought and fleshing out before they will produce actual change. In the interim, before far-reaching tort reform becomes a reality, concrete, achievable reforms must be pursued. Most important, fault should be restored to a central place in our tort system.