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RESPONSE

WHAT DAN QUAYLE DOESN'T KNOW ABOUT PUNITIVE DAMAGES

*David H. Williams**

Many of us as children played the game where we would line up in the living room, single file, and the child at the end of the line would make up a story which would then be passed down. As the story is retold each time, it becomes more embellished. Finally, the child at the end, who hears the story last, repeats it out loud to the rest of the children. Of course he believes the story to be true, but the fun of the game is to find out how far removed this child's story is from the original. Sometimes, in real life, stories like this get passed down and, if repeated enough, like a catechism, they come to be believed by those who hear them and repeat them.

Presently, some stories are being passed down the line about so-called outlandish jury verdicts and the judicial system, stories that are so far removed from the truth and the original that they would be laughable but for the fact that some people have heard them so often that they have come to believe them. The chief storyteller at this time is Dan Quayle. Significantly, however, Dan Quayle is also the kid at the end of the line.

Recently, in an otherwise well written and well researched article in this law journal,[1] the author, who was analyzing the U.S. Supreme Court's decision on punitive damages in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032 (1991), unknowingly (hopefully)

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1. Melody Sue Peacock, Note, 14 U. ARK. LITTLE ROCK L.J. 143 (1991).

became another one of the kids in the line passing on the story last embellished by the Vice President.

The latest version of this story, comprised mainly of pure unsubstantiated gossip, is that punitive damages are escalating out of control and threatening our economy. The storytellers claim that skyrocketing awards are causing elevated premiums for insurance, higher prices for consumer goods, and spiraling costs for medical care. Will punitive damages awards next be blamed for the northern advance of the African "killer" bee, or for the dwindling population of the spotted owl?

Let's begin to unravel this story and see if we can make our way up the line to its source by first examining some of the charges Dan Quayle has made against the tort system in general, and then by examining some of the specific charges that he has made in regard to punitive damages.

$300 BILLION A YEAR

In an excellent report prepared by Marc Galanter, Professor of Law and Director of the Institute of Legal Studies, University of Wisconsin—Madison Law School, Professor Galanter exposes Vice President Quayle's charge that the tort system costs us $300 billion a year as having a basically factless beginning.[2] It appears that the Vice President got his $300 billion figure from a report by the President's Council on competitiveness, *Agenda for Civil Justice Reform*. The Council's report appears to have borrowed this number from an article in *Forbes* magazine, which picked up its information from conservative author Peter Huber, who got his numbers from a single sentence uttered by businessman Robert Malott during a 1986 round table discussion on products liability.[3] According to Galanter, Huber had multiplied by three and a half Malott's undocumented surmise that the direct cost of the tort system was at least $80 billion a year to come up with the $300 billion.[4] Where did Huber come up with the three and a half multiplier? He took it from an American Medical Association (AMA) study of the costs of physicians' changes in practice relative to increases in their malpractice premiums.[5] There is no discussion anywhere of the accuracy of this multiplier or its applicability to any other form of lia-

2. Marc Galanter, *Public View of Lawyers, Quarter-Truths Abound*, TRIAL, Apr. 1992, at 71, 72.
3. *Id.* at 72.
4. *Id.*
5. *Id.*

bility. Even Huber has now admitted this defect in his methodology and, additionally, that the AMA study was "biased, no doubt."[6]

From all this, one thing stands clear. "[T]he vice president's cost estimate is not the product of any investigation or analysis by the Council he chairs, or by *Forbes*, or by Huber but is a product of casual speculation."[7]

EIGHTEEN MILLION LAWSUITS

The Vice President has charged that the United States is the most litigious country in the world. The proof he claims is the eighteen million lawsuits filed in the U.S. in 1989: one for every ten adults.[8] Admittedly, eighteen million is an impressive number at first glance. But from where, one might ask, did this figure come?

Deborah R. Hensler, a senior social scientist at Rand's Institute for Civil Justice, says that the number "is derived from state court caseload estimates published by the National Center for State Courts and includes millions of routine court filings such as divorces, wills, birth certificates, marriage licenses and small claims."[9] Ms. Hensler adds that Mr. Quayle's use of other data to support his assertions about the legal system "is at best incomplete and at worst misleading."[10]

Moving to some specifics, I will first address the charge that punitive damage awards are escalating out of control and thereby threatening our economy.[11] An insightful report can be found in the *Wall Street Journal*, a fairly conservative, business-oriented news publication. Here's what Milo Geyelin, staff legal reporter for the Journal, had to say in a recent article about the subject of Quayle's use of data to support his assertions:

> The image of runaway juries forcing companies out of business with punitive damage awards in defective product cases may itself be defective: A two-year study of product liability cases concludes that punitive damages are rarely awarded, even more rarely paid and fre-

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6. Kenneth Jost, *Tampering With Evidence*, A.B.A. J., Apr. 1992, at 45, 47.

7. Galanter, *supra* note 2, at 72.

8. Vice President Dan Quayle, Address before the American Bar Association Annual Meeting (Aug. 1991).

9. Milo Geyelin, *Quayle's Legal Data Called Misleading*, WALL ST. J., Feb. 4, 1992, at B7.

10. *Id.*

11. Peacock, *supra* note 1, at 160.

quently reduced after trial.[12]

Mr. Geyelin goes on to report that advocates of legal reform, including Vice President Dan Quayle, whom he calls the chief advocate of the legal reformers, "contend that punitive damages against manufacturers have become so routine, arbitrary and excessive that companies are withholding new products for fear of being sued over potential defects."[13]

Mr. Geyelin contends that Vice President Quayle's theory that punitive damages harm the nation's ability to compete is rebutted by a study which tracked punitive damage jury verdicts since 1965.[14] The study was conducted by Michael Rustad, a law school professor at Suffolk University, and Thomas Koenig, a professor at Northwestern University. Their study found that there were only 355 punitive damage verdicts in products liability cases during this period.[15] This remarkably low number becomes even more significant considering that a quarter of those awards involved a single product, asbestos.[16] "In the majority of the 276 cases where complete post-trial information was available, punitive damages were thrown out or reduced by the presiding judge or by an appeals court."[17] "Plaintiffs received no punitive damages in 111 cases."[18] Absent asbestos, product-defect-related suits filed in federal courts between 1985 and 1991 dropped by thirty-six percent.[19] Professor Rustad indicates, furthermore, that "[m]ost Fortune 500 companies have not had a single punitive damage award against them."[20]

Similar conclusions were reached by the United States Government Accounting Office (GAO) two years ago. The GAO found that product liability "[p]laintiffs won fewer than 50% of the cases, the sizes of jury awards were neither erratic nor excessive and punitive damages were highly correlated to economic loss."[21]

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12. Milo Geyelin, *Product Suits Yield Few Punitive Awards*, WALL ST. J., Jan. 6, 1992, (Law Section), at B1.

13. *Id.*

14. *Id.* (citing a study by Michael Rustad and Thomas Koenig, *Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter Century of Trial Verdicts* (Roscoe Pound Foundation 1991)).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Geyelin, *supra* note 9, at B7.

20. Geyelin, *supra* note 12, at B1. For an account and criticism of the Rustad and Koenig study, see Don J. DeBenedictis, *Punitives Under Control*, A.B.A. J., May 1992, at 38.

21. Geyelin, *supra* note 12, at B1 (citing U.S. GENERAL ACCOUNTING OFFICE, No. GAO/

Even Vice President Quayle's own sources contradict his conclusions. The National Center for State Courts, the same organization which provided the eighteen million lawsuits figure used by Quayle to support his claim of any overly litigious society, conducted a study of litigation in America based on claims filed between 1978 and 1984.[22] The study concluded that there was no evidence to substantiate the widespread view that there exists a "litigation explosion."[23] As a matter of fact, litigation declined in a number of states, and the rate of litigation in the U.S. closely approximated that of such other common-law jurisdictions as England, Australia and New Zealand.[24]

Professor Stephen Daniels, Ph.D., a sociology professor at Northwestern University, conducted a quantitive study of punitive damage awards for the American Bar Foundation.[25] The study analyzed the percentage of cases in which punitive damages were awarded to plaintiffs who were awarded money damages in a number of cities. Of those cities in which one might expect large punitive damage awards, a sample reveals the following: New York City, 1.6 percent; Chicago, 2.2 percent; and Los Angeles, 8.6 percent.[26] For those cities studied, product liability cases in which punitive damages were awarded ranged from 2.5 percent to 4.9 percent.[27] Furthermore, Professor Daniels found that "punitive awards were clustered, typically, in a small set of causes of action: personal violence, fraud, false arrest and insurance bad faith."[28]

Data for the Bar Foundation study were drawn from jury-verdict reporters published in thirty jurisdictions from 1981 through 1984. The conclusion drawn was that punitive damages were not, at least in the cities examined, routine. Nor were they awarded in amounts that boggled the mind. Professor Daniels asserts that "[m]uch of the discussion of problems and crises [in punitive damages] is based upon the highly visible but highly unusual megacases, not the more typical cases."[29]

HRD-91-108, PRODUCT LIABILITY INSURANCE RATE LEVELS AND CLAIM PAYMENTS DURING THE 1970s AND 1980s (1991)).

22. David Lauter, *Report Says Litigation Explosion Is a Myth*, NAT'L L.J., April 28, 1986, at 46.

23. *Id.*

24. *Id.*

25. Stephen Daniels, *Punitive Damages: The Real Story*, A.B.A. J., Aug. 1, 1986, at 60.

26. *Id.* at 62.

27. Fred Strasser, *Have 'Anecdotes,' Not Facts, Fueled Tort Crisis?*, NAT'L L.J., Feb. 24, 1986, at 15.

28. Daniels, *supra* note 25, at 61.

29. Strasser, *supra* note 27, at 15.

"Consequently, that discussion is somewhat distorted and the reforms emanating from it are rather suspect."[30]

Another premise which apparently lends itself to blind acceptance is that "skyrocketing awards are reflected in elevated premiums for insurance, higher prices for consumer goods, and spiraling costs for medical care."[31]

In an article in the February 28, 1988 *Arkansas Gazette*, none other than the head of the biggest health and medical care insurer in the State of Arkansas had this to say about the cause of the spiraling cost of medical care: "It seems every three or four years, there's a resurgence of rapidly increasing medical costs . . . there's no single cause or cure for that."[32] If the CEO of Blue Cross/Blue Shield doesn't believe that liability claims and punitive damages are causing this cyclical increase in medical costs, what could be the cause? One possibility is the way insurance companies do business.

During an airing of ABC news Nightline on February 14, 1989, Ted Koppel interviewed David McDonell, Senior Public Relations Officer for the St. Paul Insurance Companies, Michael Hatch, the Commissioner for the Minnesota Department of Commerce, and Dr. Christopher Foley, a Minneapolis internist. These spokesmen had been called to respond to charges that some insurance companies had been jacking up their medical malpractice premiums simply to line their own pockets. Commissioner Hatch's charge: "There was no increase in the claims, there was no increase in the payments, yet the premiums went up by threefold."[33] Timothy Morse of St. Paul responded that, "[t]here is truly a major problem in medical liability insurance today, and that problem is being driven by more claims and higher costs for those claims."[34]

During 1988, Commissioner Hatch's investigators conducted the nation's first independent examination of insurance company records, examining 4,747 medical malpractice claims filed between 1982 and 1987.[35] The study found that "while doctors' malpractice premiums increased some 300 percent over the past six years, the number of claims

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30. Strasser, *supra* note 27, at 15.

31. Peacock, *supra* note 1, at 160.

32. *High Profile: George Mitchell*, ARKANSAS DEMOCRAT, Nov. 13, 1988.

33. *Nightline: Medical Malpractice Insurance* (ABC television broadcast, Feb. 14, 1989) (transcript on file with Journal Graphics, Inc.).

34. *Id.* According to the broadcast, the St. Paul Companies, Inc., is the largest medical malpractice insurer in the nation, issuing policies to doctors in 43 states.

35. *Id.*

against doctors did not go up."[36] Insurance companies did not experience any increase in the amounts paid out for such claims during this period.[37] Nor did the severity, or amount paid out by insurance companies increase.[38] Finally, no increase was shown in either the number of frivolous claims filed or the fees paid by the companies in defending the claims.[39] Commissioner Hatch's conclusion was that insurance companies involved in the study were simply determined to take advantage of their captive audience.[40] The facts and figures used in this study were those of St. Paul.[41]

What about the charge that punitive damages cause "elevated premiums for insurance?" Is it possible that there might be some correlation between the rise and fall of insurance premiums and the cyclical rise and fall of interest rates? In other words, is it possible that the way insurance companies make money through their investments, and lose it, has something to do with their premium rates? Let's examine that possibility.

For insurance companies to earn profits and cover claims liabilities, they must rely on two primary sources of income: policyholder premiums, and investment earnings on money not immediately needed for the payment of claims. In high interest rate environments, therefore, an insurance company benefits handsomely by generating high levels of premium income from new policyholders so that these premium dollars can be stashed away in high yielding investments. When interest rates topped twenty percent in the early 1980s, insurance companies sought to increase premium income by slashing rates in order to sell as many new policies as possible.

According to Dennis Jay, a spokesman for the Professional Insurance Agents Trade Association, "[t]he insurance companies did anything they could to get money to put into the money markets . . . . They did not underwrite the business as well as they should have. . . . But it's very tempting to get the money in today to earn 21 percent interest and worry about the losses later."[42] A "crisis" occurred in the insurance industry when interest rates dropped and income from invest-

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *The Manufactured Crisis*, CONSUMER REP., Aug. 1986, at 544, 544.

ments took a tumble.

The insurance industry reacted in two ways to stablize its falling financial position. It first hiked premium rates for all liability coverage buyers to levels sufficient to cover current costs. Some critics have charged that these rate hikes were high enough to also recover underwriting losses sustained in previous years from the mismanagement of underwriting policy. Second, insurance companies discontinued lines of business they considered to be "high risk."

Some insurance industry representatives will admit that the cyclical downward trend of interest rates was a major factor in the perceived "crisis." According to Sean Mooney, a Senior Vice President at the Insurance Information Institute, "[t]he fact that premiums are going up is purely due to the cycle."[43] Mr. Mooney still maintains, however, that the "lawsuit crisis" is the reason that some parties are completely unable to purchase liability insurance.[44] Considering Mr. Mooney's office, this position is far from surprising.

So just who or what is responsible for our elevated insurance premiums? Is it punitive damages or the insurance industry itself? Judge the evidence, not the hype.

In Colorado, in 1989, doctors won a $4.1 million judgment against their malpractice carrier, PHICO Insurance Company, for its refusal to renew the doctors' malpractice coverage. PHICO claimed it had to pull out of the state because of soaring claims and judgments against doctors. But, Denver District Judge Nancy Rice found that PHICO had clearly misrepresented to the doctors its claim payments vs. premium dollars collected in order "to create a sense of crisis and panic among the doctors so as to justify further enormous increases in premium dollars."[45] This may answer any remaining questions about just how far some insurance companies will go in their quest for the almighty dollar.

CONCLUSION

Is there hard evidence that punitive damages are escalating out of control and thereby threatening our economy, raising insurance premiums, raising prices for consumer goods, and sending medical costs spi-

43. *Id.* at 544-45.

44. *Id.* at 545.

45. Howard Pankratz, *Colorado Doctors Win $4.1 Million Ruling*, THE DENVER POST, Sept. 6, 1989, at 1-A.

raling? No. As has been shown by the studies set out herein, except for the special case of asbestos litigation, product suits have declined sharply over the past five years. Even a new study conducted by a tort-reform sympathizer[46] suggests that, while large liability costs can deter product innovation, this is true for only a handful of industries. For all the rest—including such attractive product liability targets as automobiles, pharmaceuticals and the bulk of the chemical industry—the study, conducted by Professor W. Kip Vicusi of Duke University, concludes that the costs of product liability "provide safety incentive effects that more than offset the product withdrawal effects."[47]

So, just what is going on here? This is my guess. If the Vice President and the tort reformers can maintain the focus on punitive damages, product liability, and the jury system as scapegoats, businesses and the insurance industry can avoid hard questions about their own failings, and about the real problems undermining the U.S. economy. In a word, it's politics, pure and simple.

One thing is for sure. Lawyers are not going to stand still for this kind of thing. The Vice President will be called on the carpet. Just like that last kid in the line, Dan Quayle is telling this story, but it bears little resemblance to the original. The only problem is, Dan Quayle doesn't realize he's just the kid at the end of the line.

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46. Jost, *supra* note 6, at 48.
47. *Id.*