BOOK REVIEW

THE MODERN TORT LAWYER: HERO OR VILLAIN

Lawyers and the American Dream, STUART M. SPEISER, Evans, New York (1993) (414 pages).

*Reviewed by Michael P. Ambrosio**

In *Lawyers And The American Dream,* Stuart M. Speiser provides a useful historical, economic, and moral perspective on the role of lawyers, and in particular tort law specialists. In language devoid of legal jargon and readily understandable by the lay reader, Speiser gives a scholarly treatment to the case law developments that have rendered manufacturers legally accountable to those who have been seriously injured by their dangerously defective products. He makes cogent arguments for punitive damages, pre-judgment interest on damage awards for personal injury claims, the contingent fee, and open access to the legal system.

But Speiser is too zealous an advocate for the contingent fee and the practices of the modern day tort lawyer. He overstates the case for the contingent fee and the professionalism of the modern day tort lawyer, going so far as to suggest that the principle of performance-based pay, which is reflected in the contingent fee, is a panacea for virtually all the problems of society. Indeed, Speiser's idea of the American Dream seems to be a products liability claim in which liability is clear and the damages recoverable are enough to put both the lawyer and his client on "easy street." He is at his best when describing the twists and turns of litigation on behalf of clients who were decided underdogs against rich and powerful adversaries and in showing the fallacious reasoning behind proposals for state and federal legislation to limit liability for defective products.

As the author of 43 volumes on law and economics and as an innovative tort lawyer for nearly 50 years, Speiser provides valuable insight into the role and responsibilities of lawyers in American society. In *Lawyers and the American Dream,* which is a virtual primer

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on products liability law, Speiser tells the story of the emergence of tort litigation specialists in the latter half of the twentieth century as a powerful force for justice. He contends that the modern tort lawyers' creative use of scientific evidence and expert witnesses, their dedication to the client's cause and their moral vision have made the American Dream a reality for themselves and for many of their clients. In this very readable book, the author takes aim at individuals and institutions who abuse their economic and political power. The following definition of torts that appears in the lexicon at the beginning of the book reflects the careful scholarship, clarity of thought, and concern for right and wrong that permeate its 414 pages.

> Torts is the catch-all name for the "wrongful" conduct that gives rise to most civil lawsuits. The most common tort cases are those involving personal injury or death arising out of accidents. The tort involved in accident cases is usually called negligence, although in cases involving injuries or deaths caused by defective products, the tort is called product liability rather than negligence. Other prominent torts are defamation (which is called libel if it involves written words and slander if based on spoken words); fraud; wrongful firing of employees; pollution of the environment; assault; battery; false imprisonment; and invasion of privacy. Lawyers who specialize in representing plaintiffs in tort cases are usually called tort lawyers, negligence lawyers, personal injury lawyers, or contingent fee lawyers. For those interested in etymology, the word "tort" derives from the latin verb "torqueo" (to twist or to bend)—something twisted, not right, and therefore wrong.[1]

The principal theme of this book is that tort law specialists can, and do, foster the ideal of equal justice by taking on cases against the rich and the powerful who are accustomed to manipulating the legal system with the aid of the country's largest and most successful law firms. The author describes a special breed of lawyers—those he calls "The Equalizers"—who are continually striving for excellence, rely on thorough investigation and expert testimony to win cases, and for whom the practice of law involves the opportunity for substantial financial success as well as the "pursuit of justice and righteousness and the making of moral choices." He notes that this special breed of lawyers is a peculiarly American phenomenon because every other country prohibits the contingent fee, thereby preventing lawyers from developing into Equalizers.

In the first Chapter, Speiser considers various definitions of the

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[1] STUART M. SPEISER, LAWYERS AND THE AMERICAN DREAM ix (1993).

American Dream in literature (especially as seen in the popular novels of leading American novelists), movies and television. He analyses how the fictional lawyers in the popular television program *L.A. Law* provide a good picture of the modern day tort lawyer's quest for excellence and pursuit of the American Dream. Speiser offers the following one sentence definition of the American Dream: "Achieving excellence on your own, and using it to do well financially and have a happy life, while doing good for others less fortunate."[2]

This definition of the American Dream is tailored to fit the tort law specialists, "The Equalizers", because they do well by doing good. While he has high praise for other equalizers, such as civil rights lawyers like Thurgood Marshall, who dedicated their entire professional career to the pursuit of equal justice under the law, he points out that they did not realize the American Dream because they had no interest in doing well financially. He makes strong arguments for greater moral and legal accountability for the makers of unsafe products that cause serious injuries to the innocent and unsuspecting. With the persuasiveness and logical precision of a master advocate and the crisp, lucid prose of a good novelist, Speiser argues that open access to the courts and adequate compensation to innocent victims of accidents are essential ingredients of a just legal system.

Although he is concerned with the positive/idealistic conception of the American Dream based on success, the good life and getting ahead, the author notes that there is also a negative connotation of the term. He refers to a 1991 book by Dr. Martin Seligman, entitled *Learned Optimism*, which cites government statistics showing that psychological depression is ten times more prevalent than it was 50 years ago. Dr. Seligman ascribes this phenomenon to our society's focus on the self to the exclusion of older values that taught belief in the nation, the family, God, or a purpose that transcends our own lives. Speiser opines that one antidote to this social condition is to restore belief in the nation by preserving and revitalizing the American Dream.

Speiser ponders the morality of American business leaders and asks why so many company executives were willing to keep dangerously unsafe products on the market despite knowing of their danger. He writes:

> The fact that such deadly products were kept on the market by executives who knew of their dangers makes one wonder about the basic morality of American business management. It is tempting to speculate on whether bad guys who'll do anything

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[2] *Id.* at 13.

> for a buck inevitably muscle their way to the top echelons of business. But I don't think that's the answer. As a group, the top executives of our nation's large manufacturing enterprises are leading contributors to the nation's welfare, through their military service, and their support of education, religion and good works. Morally they are as good a group as our nation can produce.But somewhere along the line, most of them develop a double standard which permits them to live with (indeed, to be comfortable with) practices in business that they would never use or condone in their personal lives. There is no evidence that those below them would be immune from this double standard if they were promoted to the top jobs. In large companies, there is often a form of team psychology that causes seemingly moral people to participate as a group in immoral business actions that few of them would take on their own. This team drive to succeed often turns corporate management into a steamroller that runs right over safety problems if they stand in the way of profits.[3]

Despite his belief in the free market system, Speiser is sensitive to the need to balance efficiency with fairness. While recognizing the many defects of the profit driven free market system, he notes, with approval, that Americans believe that it is the best that can be devised to spread the good life to most of our people and that it is the most hospitable to democratic principles. He contends that the answer to the problems of the free market system lie in maintaining the accountability of the corporation—and eventually the individual accountability of its officers—for the immoral group actions of professedly moral individuals. He asserts that for the foreseeable future we will have to rely on the deterrent effect of tort law—especially punitive damages—as practiced by "the Equalizers," to protect the public against unsafe products.

Speiser points out that it is not so much that tort law has changed in the last half of the twentieth century, but that tort lawyers have changed. He notes that tort law is simply returning to where it once was—strict liability for the manufacturers of dangerously unsafe defective products. He recounts his efforts to change state laws that placed strict limits on damages recoverable in actions for wrongful death. He defends the contingent fee as a performance-based payment and makes the case for punitive damages and for prejudgment interest on damage awards for personal injury claims. He is especially persuasive in his argument that prejudgment interest should be allowed on awards of damages for personal injury claims no less than in those

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[3] *Id.* at 303.

cases that vindicate property rights. Speiser argues against proposals, like those of the President's Commission on American Competitiveness, to limit the liability of American manufacturers for defective products and to do away with punitive damage awards. He argues that, in a free market competitiveness depends on quality products, and that bankruptcy is the appropriate fate of companies whose unsafe products cause serious injuries to consumers. The core of his argument for holding manufacturers legally responsible for damages caused by their products is that simple justice requires the righting of wrongs.

Readers will bristle at the paltry sums received in the settlement of cases brought on behalf of the innocent victims of well publicized national disasters at the turn of the century. To illustrate the inadequacy of awards to the successful plaintiffs in tort suits before the advent of "The Equalizers," Speiser provides the following two striking examples. In the 1903 fire in Chicago's Iroquois Theater, in which 602 people, mostly women and children, were killed, most families received no compensation while a few dozen civil suits were settled for $750 per death. In the 1911 fire at the Triangle Shirtwaist factory in New York City that claimed the lives of 145 employees, claims were settled for $75 each despite the building's clear violation of the fire laws.

Speiser portrays law and lawyers at their best and at their worst in his account of a number of high stakes legal battles in which he was personally involved representing clients, all of whom were decided underdogs. Speiser writes about his cases in dramatic detail and with a clear and unmistakable emphasis on the human interests and the competing values at stake. The narratives of his representations in *Jane Froman v. Pan American Airlines*, *Ralph Nader v. General Motors*, *Donald McCusker v. Aristotle Onassis*, and Paolo Gucci in a number of civil and criminal actions are simply riveting.

Although at times self aggrandizing, Speiser credits the late Professor William Prosser, Melvin Belli, Harry Gair and other tort law specialists for breaking through the barriers to adequate compensation for victims of accidents caused by dangerously unsafe defective products. He may give entirely too much credit, however, to a few elite lawyers who have won major victories in the courts, and far too little credit to the lobbying efforts of the organized bar, the scholarship of academicians, and the legion of anonymous lawyers and judges who have advanced the interests of innocent accident victims.

Lawyers and the American Dream is instructive, and often inspiring, especially in its portrayal of the lawyer as a popular hero. At the same

time, it represents a highly critical commentary on American business leaders and the lawyers and law firms who represent them. Although lavish in his praise of "The Equalizers," the author provides a critical assessment of the weaknesses and deficiencies of other lawyers and the legal profession in general. He has a dim view of the highly paid corporate law firms who do not accept moral or public accountability for their clients' objectives and of those tort lawyers who make their living at the expense of their clients through fraud or otherwise unethical practices. He asserts that ethics codes, in general, neither prevent unethical and highly questionable practices, nor render lawyers accountable to the public interest.

Speiser has a great deal of faith in the free market system and the contributions of tort litigation specialists to fostering the American Dream. Although he provides an expansive notion of the American Dream, which he sets forth in "a smorgasbord of politically neutral elements" based on "the values shared by most Americans," he does not go so far as to suggest that tort litigation will produce this expanded version of the American Dream. He lists the following as elements of this expanded version of the American Dream.

> 1. A BETTER LIFE FOR ALL. Richer, happier. Wealth, material success, recognition. Loving and being loved. Owning your own home.
> 2. ACHIEVING THIS ON YOUR OWN. Excellence. Self-made success. Individualism, self-reliance. Self-initiative. Self-esteem. Drive for self betterment. Education. Personal responsibility. Independence. Entrepreneurship. Hard work. Know-how. No reliance on help form government or institutions. Control of your own destiny.
> 3. HUMANITARIAN CONCERN FOR OTHERS. Doing well by doing good. Seeking the rainbow as well as the pot of gold.
> 4. FREEDOM FOR ALL. Freedom of choice. Freedom to do your best. Freedom from prejudice. Freedom from obstacles. Spirit of the Founding Fathers.
> 5. LIBERTY AND JUSTICE FOR ALL. Equality. Social justice. Equal justice under law.
> 6. OPPORTUNITY FOR ALL. Rags to riches. Empowerment of the weak and the underdog.
> 7. MELTING POT. Fulfilling the dreams of people from all parts of the globe.
> 8. HAPPY ENDING.[4]

Speiser never addresses directly whether or to what extent law and lawyers, or tort law and tort lawyers, foster this expanded concep-

[4] *Id.* at 14.

tion of the American Dream. He comes close to doing so when he suggests that the attainment of the American Dream by many of the Equalizers and their clients is "important as an inspiration to those seeking a better life through free-market capitalism within a democracy—a category which now includes most of the world." He posits that the Equalizers help redistribute wealth, empower the poor, help keep families together, and reduce dependence on government intervention. While these positive outcomes may be achieved for successful litigants, to suggest that products liability litigation makes a significant contribution toward the solution of America's most pressing social problems is quite a stretch. In his zeal to justify the high contingent fees of the elite tort lawyers, Speiser is too ready to ignore the data that show very few tort plaintiffs receive substantial damage awards, the tendency of some tort lawyers to work on a high volume of cases and quickly settle them far below their potential value, the dramatic increase in legal malpractice claims, and the high cost of litigation that presents an obstacle to bringing all but the very best cases where liability is clear and damages are substantial.

Speiser goes on to describe the economic impact of tort litigation. He argues that the contingent fee is an example of the principle of performance based pay, which many experts believe can be used to recharge the batteries of American business and improve the productivity of educators and government workers. Mr Speiser takes the position that tort litigation produces a lot of economic activity, and suggests that legislatures will ultimately recognize that proper funding of the court system is a good investment. He even advocates taxing successful civil litigants to finance the cost of open access to the legal system. Although perhaps it is understandable from his point of view, Speiser overstates the importance of tort litigation in attaining the goal of equal justice under law. He affirms the need for both commutative and distributive justice, and correctly points out that damage awards foster both forms. Despite the redistributive effect of damage awards in tort cases, however, the lack of distributive justice in American society would not be remedied even if every injured person had access to the law and the very best lawyers.

Speiser is, perhaps, too laudatory of tort law specialists and too critical of the legal profession as a whole. He assumes that, no matter how great the amount of the contingent fee, it is deserved because of the risks involved for the lawyer and his substantial investment in the cost of litigation. He makes the standard argument, that because tort lawyers sometimes lose cases and earn no fee, they are justified in charging high fees in other cases to make up for their losses. This

argument is somewhat inconsistent with another of the standard arguments in defense of the contingent fee, that tort lawyers do not file frivolous cases or cases without merit because they realize they can not make any money on them. Whatever the merits of the contingent fee and despite the criticism of it, it is a firmly established feature of our legal system and will likely remain so for the foreseeable future. Nevertheless, in recognition of contingent fee abuses, most states limit the amount of contingent fees and require approval by the court of contingent fees beyond the statutory maximum. Contingent fee rules have also been strictly construed to prohibit lawyers from charging or collecting contingent fees that bear no relationship to the amount of the work performed. Just because the damages in a case are very substantial, it does not necessarily follow that liability will be difficult and costly to prove.

Speiser seems to suggest that the fraudulent practices of tort lawyers are mostly a thing of the past; such a suggestion flies in the face of the investigations of widespread abuses by negligence lawyers currently going on in a number of states. His statement suggesting that only marginal lawyers, doing business in ethnic neighborhoods, engage in fraud and other questionable conduct, is an all too common view of prosperous lawyers who too readily equate financial success with virtue.

Speiser fails to take account of the changing attitudes and perceptions of the lawyer's role and responsibilities and dismisses lawyer's ethics codes as essentially of little consequence in rendering lawyers accountable to the public. He assumes that corporate lawyers will inevitably tell their clients only what they want to hear, and seek to find legal means to achieve client objectives that are morally repugnant. Even if one assumes that corporate counsel are more likely to "go along to get along" than other lawyers, strict rules of professional ethics adopted by many states now require disclosure of wrongdoing, and recently enacted federal and state whistle blower statutes offer protection that was previously unavailable to those intent upon doing what is right, i.e. morally correct. Moreover, common sense may lead corporate lawyers to the realization that it is in their best interest, and the best interest of their corporation, if they take the opportunities afforded them to shape corporate culture and provide wise counsel with an eye toward the public interest. The conception of the lawyer as an independent moral agent and moral activist is emerging as an alternative to the standard conception of the lawyer as a pure legal advocate who is a morally neutral and partisan advocate of client interests. This alternative conception was embodied in the original draft of the ABA

Model Rules of Professional Conduct published in 1980. A number of states saw fit to adopt the stricter standards of the original draft rather than the watered down final version adopted by the ABA in 1983.

What is most appealing about Speiser's depiction of tort law specialists such as The Equalizers is his emphasis on their pursuit of justice and their moral activism. Even if one disagrees with his conclusion that "tort law is about simple justice, the righting of wrongs" and "about compensation, accountability and deterrence," one will appreciate his careful and colorful prose and the fervor of his defense of tort lawyers and the present tort system. *Lawyers and The American Dream* leaves little doubt that realization of the American Dream for tort law specialists is reliant upon the contingent fee. Although Speiser seems to raise the principle of performance-based pay, which the contingent fee is but one example, to a first order principle, I doubt that it can fulfill the dreams of every American. Despite its shortcomings, Speiser has written a book that is worthwhile reading for lawyers and laymen who seek a better understanding of the issues surrounding the tort law system and proposals for its reform.