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To Be or Not to Be: Reflections on Changing Our Tort System

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TO BE OR NOT TO BE: REFLECTIONS ON CHANGING OUR TORT SYSTEM

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I. THE PLIGHT OF THE LIABILITY INSURANCE INDUSTRY

Professor Galanter's analysis of litigation statistics provided by the National Center For State Courts and by the Administrative Office of the United States Courts presents a potent antidote to the persistent charges of a runaway tort system characterized by excessive amounts of litigation and verdicts. His conclusions are supported by a critical article in the August 1986 issue of *Consumer Reports*,[1] and by a review of the causes of the current liability insurance crisis in a report of an ad hoc committee on insurance prepared by the National Association of Attorneys General.[2] The latter report contends that the property/casualty insurance assertions of economic woe are distorted by inappropriate accounting methods that do not establish realistic reserves and that fail to reflect real income in terms of premium investments and capital gains.[3] The report concludes that the property/casualty insurance industry has shown a healthy real profit over the past decade, and that there has been a substantial upturn in insurance earnings in 1985-1986 since the low year of 1984.[4]

Professor Galanter notes that the province of Ontario, Canada is experiencing a liability insurance availability and affordability crisis even though that jurisdiction already has in place many of the tort changes currently advocated by the insurance industry.[5] This observation parallels that of the Attorneys General report to the effect that prior restrictive tort changes in Pennsylvania and in various state medical malpractice laws have had no appreciable effect in low-

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1. *The Manufactured Crisis*, CONSUMER REPORTS 544 (Aug. 1986).

2. F. BELLOTTI, J. VAN DE KAMP, L. THORNBURG, J. MATTOX, C. BROWN, B. LAFOLLETTE, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (1986) [hereinafter BELLOTTI].

3. *Id.* at 10-16.

4. *Id.* at 37 n.10.

5. Galanter, *The Day After The Litigation Explosion*, 46 MD. L. REV. 3, 37 (1986).

ering insurance liability premiums in those jurisdictions.[6] There are other data indicating that liability insurance rates in many sectors of the economy have drastically increased without any evidence of excessive or even notable claims increases;[7] and the General Accounting Office has estimated that the rate of liability insurance premium increases in the last few years has more than doubled the rate necessary to compensate for increased claims losses in those years.[8]

These conclusions suggest a cautious attitude toward the tort changes currently being proposed to cure an insurance problem that either may not exist—or, if it does exist, may be only tangentially related to the tort system. Moreover, even if it could be demonstrated that recent liability insurance premium increases, market withdrawals, and restrictions of coverage were substantially caused by the tort system, it must still be asked whether the proposed tort changes are justified on their own merits. Even if there is a tort litigation and verdict explosion, that explosion may be fully justified given current conditions,[9] and tort claims verdicts may be substantially valid.[10] The appropriate inquiry, therefore, is to examine the proposed changes on their own merits, apart from any relation between the tort system and the insurance industry.

II. COMPLAINTS AGAINST THE TORT SYSTEM

The most common current litany of complaints against the tort system centers on six principal areas: (1) the restriction or elimination of punitive damages; (2) the elimination of the collateral source rule; (3) the adoption of a general tort statute of repose; (4) the elimination or restriction of contingent fees; (5) the restriction on recovery for pain and suffering; and (6) the elimination or restriction of joint and several liability. Some reflections on these proposals are therefore in order.

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6. BELLOTTI, *supra* note 2, at 43-44.

7. *See, e.g., Testimony of Val Cox, President of Ocoee River Outfitters Ass'n; Brian Rosecrance, Executive Director of Appalachia Serv. Project; and Tim Wibking, Staff Attorney for the Tennessee School Boards Ass'n, Before the Tennessee Governor's Task Force on Tort Reform*, (Memphis, Tenn., July-Aug. 1986).

8. BELLOTTI, *supra* note 2, at 40. The GAO estimated that an approximate 30% increase in general liability premiums in 1984 would have enabled the insurers to compensate for increased losses. In 1985, however, the industry recorded an increase in general liability premiums of 81%. Since 1984 was the industry's worst year, it was assumed that the 30% figure, or even less, would have applied in 1985 also. *Id.*

9. *See* Galanter, *supra* note 5, at 27-28.

10. BELLOTTI, *supra* note 2, at 28-29 (noting that increases in verdict amounts may be due to increased medical expenses and rising wages).

A. Punitive Damages. One of the things that strikes fear in the hearts of liability insurers is the possibility of large punitive damage awards, particularly in the mass-litigation context such as asbestos and Dalkon Shield claims. The complaint is that these damages are uncontrolled, and that they provide a windfall to the plaintiff.

Over against these arguments is the proposition that willful, wanton misconduct does occur, and when it does it should be punished. The criminal justice system, for whatever reason, does not seem capable of providing the needed deterrence in this context. The windfall argument is also countered by the proposition that the possibility of recovering punitive damages may provide a necessary incentive for an attorney to bring a meritorious and socially desirable claim that would otherwise be financially unattractive to the attorney.[11] In any case, it does not appear that many punitive damage claims are successful,[12] and the courts carefully scrutinize and often eliminate or reduce such awards.

In order to make certain that punitive damages are imposed only when they are clearly and equitably called for, a few corrective measures might be taken short of eliminating punitive damages altogether. First, the burden of proof, which in most jurisdictions is a mere preponderance of the evidence, might be raised to a clear and convincing standard before awarding punitive damages.[13] Second, vicarious liability for punitive damages could be eliminated.[14] On this point it is interesting to note the anomaly that punitive damages are typically insurable when they are imposed vicariously, as for example against a corporation for the acts of its employees. Heretofore, however, insurers have resisted any effort to exclude such insurance coverage on the ground that this exclusion would create a conflict for the insurance company, whose interests would then be served by proof of recklessness if such proof relieved the company of liability.[15] This conflict would presumably be eliminated if insur-

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11. *See* W. PROSSER, J. WADE, V. SCHWARTZ, CASES & MATERIALS ON TORTS 561 (7th ed. 1982).

12. Daniels, *Punitive Damages: The Real Story*, 72 A.B.A. J. 60 (Aug. 1986).

13. "A few jurisdictions require clear, cogent, and convincing evidence, at least in some actions before awarding punitive damages. Most require a mere preponderance of the evidence." K. REDDEN, PUNITIVE DAMAGES § 7.2(A)(3) (1980).

14. "A number of courts, perhaps, as usually asserted, the majority of those that have passed on the issue, hold the employer, especially the corporate employer, liable for punitive damages for malicious acts of the employee." D. DOBBS, REMEDIES 214 (1973).

15. *See* Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 14 n.12 (1978).

ance liability were nevertheless imposed for compensatory damages though recklessness is shown.

B. The Collateral Source Rule. A longtime favorite whipping boy of tort law critics has been the collateral source rule, which allegedly allows economically wasteful double recovery for the same injury. The criticism of this rule disregards the compelling consideration that collateral sources are derived from the generosity or thrift of the plaintiff or third person who never intends to confer a benefit on the tortfeasor through such sources. Curiously, no one suggests that the collateral source rule should be eliminated with reference to life insurance proceeds, although clearly such proceeds are a collateral source in a wrongful death case. Moreover, if the rule were eliminated, any economic efficiency thereby obtained could well be obviated by widespread adoption of subrogation on behalf of the collateral source provider.[16]

C. Statutes of Repose. A sustained effort to pass statutes of repose has been a phenomenon of legislative lobbying for tort law change during the past several decades. A cut-off of claims, without regard to their accrual date, was first adopted in the construction industry,[17] then in medical malpractice,[18] and more recently in products liability.[19]

A number of courts have held such statutes to be unconstitutional.[20] Whatever the outcome on that issue, such statutes are harsh and their time period bears no reasonable relationship to the validity or invalidity of the underlying claim. Moreover, they are subject to a number of exceptions, either by statute or at common

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16. Property insurance claims are generally subrogated to the insurer; the practice of subrogation varies with medical, surgical, and hospitalization insurance. R. KEETON, INSURANCE LAW 147, 149 (1971). Many states allow the employer to be subrogated, to recover workers' compensation payments, in an action by an employer against a third-party tortfeasor. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 74.00-74.50 (1983). The majority view holds that the employer's contributory negligence, if any, is no defense to this third-party action. Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035, 1046.

17. Dworkin, *Product Liability of the 1980s: "Repose Is Not the Destiny" of Manufacturers*, 61 N.C.L. REV. 33, 43-44 (1982).

18. *Id.*

19. *See* Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 664 (1978).

20. *See, e.g.*, Hanson v. Williams County, N.D., Prod. Liab. Rep. (CCH) ¶ 11,000 (D.N.D. 1986), and cases cited therein.

law, thereby making the rule seem arbitrary in application.[21]

The reason insurers want a repose statute is to eliminate the possibility of claims arising on a policy long after the policy has expired. The possibility of such "long tail" claims makes rate-setting very difficult, the insurers contend. However, insurers are seeking a change from an "occurrence" to a "claims-made" basis of coverage,[22] and this change if adopted should substantially solve the long-tail problem, at least for insurers. Under a claims-made policy, regardless of when a claim arises against the insured, the insurer will be liable only for claims asserted during the policy year.

Much can be said for a uniform statute of limitations for all tort claims irrespective of the theory asserted or the type of damage claimed. Such a uniform period would eliminate the anomaly of one statute undermining the protection of another, and the apparently arbitrary differences of time among different statutes of limitation. A uniform statute of this sort, however, should have a rule of reasonable claim discovery as the basis for accrual of the claim and commencement of the period of limitation, in order to avoid the harshness of a repose type of statute.

D. The Contingent Fee. There is a widespread belief among insurers that the contingent fee system encourages litigation. In fact, the system probably has just the opposite effect, since a prudent attorney will not risk the time and expense of litigation on a contingent basis for a claim that is of doubtful merit. Whatever considerations may encourage frivolous claims or defenses, they seem not to include the contingent fee system. Moreover, the contingent fee arrangement provides access to the judicial system by the ordinary person in a way that fosters democratic values.

The concern that contingent fees are often or sometimes excessive presents an entirely different issue. However, all fees are subject to judicial review under a court's inherent supervisory jurisdiction. In addition, attorneys are subject to discipline for

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21. *See* Phillips, *supra* note 19, at 666-72.

22. The Insurance Service Office has proposed a new claims-made policy form, and insurers are pushing for its adoption. Hilder, *Changes in Liability Insurance Spur Confusion Among Business Clients*, Wall. St. J., Nov. 20, 1985, § 2, at 33, col. 4; *Policy Language Developments*, 8 Ins. Litig. Rep. (Miller-Freeman) 944-45 (Mar. 1986). It is not clear, however, that this new form will be widely adopted, or that it is at all desirable for the insureds. *See* Anderson, Newman, & Russel, *Proposed New Claims-Made Liability Insurance Policy: Panacea or Golden Road to Disaster*, in INSURANCE, EXCESS & REINSURANCE COVERAGE DISPUTES 1986, at 393, 434-35 (1985); *Opinion and Decision of New York State Insurance Department on Issues Raised by Insurance Services Office on Commercial General Liability Claims-Made Form*, 1986 J. INS. REG. 39.

changing excessive fees.[23] Thus, the remedies for excessive fees are already in place.

E. Pain and Suffering. There have been widespread efforts to limit—or place a cap on—the amount of recoverable damages for pain and suffering in tort litigation, and these efforts have met with some notable successes to date.[24] The basis for the attack on recovery for pain and suffering is much like that for punitive damages—namely, that these damages are not readily measurable and are subject to arbitrary fluctuation in amount.

Unlike the situation for punitive damages, however, there appears to be no widespread current move to abolish pain and suffering damages entirely. Rather, the effort is simply to place a fixed dollar limit on the amount of such damages recoverable in a single tort action. A fixed damage figure, however, is as arbitrary as the uncertainty in amount of recovery it seeks to cure. Also, a statutory limitation of this sort freezes the law in an area that should remain flexible to meet changing times and circumstances. The inability to keep statutes abreast of changing times is notorious.[25]

Uncertainty cannot be eliminated from many of the important areas of the law, nor should it be. The reasonable person and proximate cause standards should not be poured in concrete. Neither should damages for pain and suffering. It cannot be doubted that damages for pain and suffering are among the very real damages suffered by a tort victim.

To argue that many people suffer pain without remedy is beside the point. Many people suffer lost employment without remedy also. It may be that tort compensation arbitrarily distinguishes between victims of actionable and of nonactionable misfortunes, if compensation were the only goal of tort law. But the distinction is justified when the equally important goal of tort deterrence is taken into account.

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23. *See, e.g.*, Florida Bar Ass'n v. Moriber, 314 So. 2d 145 (Fla. 1975).

24. Recently, the following states placed caps in varying amounts on the amount of recoverable noneconomic damages: (1) *Alaska*: Act of June 10, 1986, ch. 139, 1986 Alaska Sess. Laws (to be codified as ALASKA STAT. § 09.17.010); (2) *Connecticut*: CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1986); (3) *Florida*: Act of June 26, 1986, ch. 86-180, 1986 Fla. Sess. Law Serv., No. 5, p. 660 (to be codified as FLA. STAT. § 768.80); (4) *Maryland*: Act of May 27, 1986, ch. 639, 1986 Md. Laws 2347 (to be codified as MD. CTS. & JUD. PROC. CODE ANN. § 11-108); (5) *New Hampshire*: Act of June 6, 1986, ch. 227:13, 1986 N.H. Laws (to be codified as N.H. REV. STAT. ANN. § 508:4-d).

25. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES ch. 1 (1982).

F. Joint and Several Liability. Another major area of attack, with some signal success,[26] has been against the doctrine of joint and several liability. If fault is the basis of tort liability, say the critics, then why hold a tortfeasor liable for more than his or her own degree of fault?

One aspect of this attack implicates the doctrine of comparative fault, which has been adopted in some form in an overwhelming number of American jurisdictions.[27] Under this doctrine, the amount of the plaintiff's recovery is reduced by the percentage of his or her own fault, which may include contributory negligence, assumption of the risk, and misuse of a product or instrumentality.

The real sticking point, however, relates to the question of who should bear the percentage of responsibility of an entity against whom judgment is uncollectible. Should the plaintiff, or the defendant?

If the plaintiff is without fault, then as between an innocent plaintiff and culpable defendant the risk of nonrecovery against a third person should equitably lie with the culpable defendant. This is the doctrinal basis for joint and several liability at common law, when contributory negligence was a total bar to recovery and the plaintiff could not recover unless entirely free of fault. This doctrinal basis is undermined, however, in comparative fault when a partially at-fault plaintiff can nevertheless recover—unless it is argued that contributory (i.e., self-directed) fault is less culpable than negligence (i.e., fault directed toward another). It is likewise undermined in those cases in which a defendant can be held strictly liable without regard to fault.

The Uniform Comparative Fault Act apportions the uncollectible percentage of fault or causation of a third party between or among the plaintiffs and defendants based on their relative degrees of fault or causation.[28] This seems fair. The Act does not abolish joint and several liability as such, but apparently places the initial burden on the defendant to show that contribution is not available before a proportionate reallocation of liability is made.[29]

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26. For example, by proposition 51, approved by the California electorate on June 3, 1986 (to be codified as CAL. CIV. CODE § 1431.2 (West)), California has abolished joint and several liability for noneconomic damages.

27. V. SCHWARTZ, COMPARATIVE NEGLIGENCE 1-3 (2d. ed. 1986) (by early 1985 comparative negligence had replaced contributory negligence in at least 44 states); *see* Coney v. J.L.G. Industries, Inc., 97 Ill. 2d 104, 454 N.E.2d 197 (1983) (listing jurisdictions that have retained joint and several liability as part of their comparative negligence doctrine).

28. UNIF. COMPAR. FAULT ACT § 2(d), 12 U.L.A. 41 (Supp. 1986).

29. *Id.* at 41-42 and comment thereto.

It is doubtful in any event that joint and several liability should be abolished for cases of defendants acting in concert, or for cases of principal and agent defendants. Here the maxim of *qui facit per alium facit per se* seems peculiarly applicable. In these situations, also, equitable reallocation of an uncollectible portion of liability arguably should not be made between plaintiff and defendant, but instead the defendant should bear the portion of responsibility of its alter ego.

III. CONCLUSION

A number of questions are raised by the current problems associated with the availability and affordability of liability insurance. It is far from clear that the tort system has caused these problems, or that proposed changes in that system would remedy the problems.

Even assuming that some changes in tort law would alleviate insurability problems, however, it does not follow that those changes should be made. If the tort system in its present form serves a useful societal function—as it apparently does—of providing individualized justice and a sense of personal vindication and accountability,[30] that system should not be altered in major ways absent substantial proof of its inadequacy. Given present indications, so well documented by Professor Galanter and others, that proof has not yet been presented.

30. *See* W. BECKMAN, G. BELL, B. BORISH, P. CORBOY, D. HASKELL, W. LUNDQUIST, R. SUHREINRICH, S. SHAPO, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 12-12; 13-16, 14-12 (1984) (report to the A.B.A.; M. Shapo, Reporter).