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Book Note

Why Lawsuits are Good for America, Disciplined Democracy, Big Business, and The Common Law. By Professor Carl T. Bogus. Pp. 265.

Arlene Violet*

You've all heard the one about the runaway jury who gave a humongous award to a woman who sued McDonald's because she spilled coffee on herself. You probably even chuckled at Ronald Reagan's anecdote about a cat burglar who fell through the skylight of a home he was burglarizing, only to successfully sue the homeowner for his injuries.¹ No wonder so-called tort reform has gained momentum in the United States. But propagandists beware! Professor Carl Bogus exposes the origins of these urban legends and the motives of those who created them. In *Why Lawsuits are Good for America*, Professor Bogus debunks the myths surrounding these and other headline grabbing cases and exposes the political motives behind the creation of these legends.

Professor Bogus contends that political motives are the impetus for the tort reform movement. As an example, just prior to a vote on restrictive federal products liability legislation, Senator John C. Danforth, a Republican and Yale Law graduate, spoke on the senate floor. Senator Danforth, speaking favorably for the restrictive legislation, recounted an incident where an elderly gentleman received a \$127 million jury award after losing an eye that was injected with a defective drug manufactured by the Upjohn

* In 1984 Arlene Violet was the first woman elected Attorney General in the United States. While currently practicing law in Rhode Island, she was recently named one of the fifty most influential women in law, an honor shared with Justices Sandra Day O'Connor and Ruth Bader Ginsberg. In 1996 she was inducted into the Rhode Island Heritage Hall of Fame.

1. The real case turns out to be about a high school student who was sent to retrieve some athletic equipment stored on the roof of the school. The boy fell through a skylight that had been painted black.

Company. Surely something had to be done to prevent such outrageous jury awards from occurring in the future.

That "cock and bull" story, as Bogus relays, was inherently deceiving. Upon closer examination, large jury awards do not merely compensate for an injury, the standard tort remedy, but also punish companies for wrongdoing. Bogus's point is that that is a good thing. Companies should be punished by juries because it is socially useful; it helps protect consumers and forces companies to make better, safer products. Tort reform does not address that issue, but it does serve as a right-wing, big business tool to keep jury awards down . . . and profit margins up. Thus, Bogus proposes that those who support tort reform are primarily Republicans with a hidden agenda: appeasing big business and corresponding campaign contributions, as well as winning over voters who fall prey to the distortion of the truth behind jury awards.

This book also looks deeper into the evidence presented during those legendary cases, either revealing the true context of cases, like the McDonald's litigation, or exposing the so-called cases as apocryphal. His tome of the McDonald's case analyzes the facts. McDonald's served its coffee between 180-90 degrees Fahrenheit. In contrast, home-brewed coffee is served between 130-40 degrees. During the previous decade, McDonald's received over 700 reports of the scalding of patrons. In this case, the plaintiff's burns required numerous skin grafts, leaving 16% of her body with permanent scarring. While the trial judge reduced the award, he nonetheless agreed with the jury that McDonald's was guilty of "willful, wanton and reckless behavior." Professor Bogus suggests that the trial judge's remittitur demonstrates that, indeed, the jury system worked as it should. Professor Bogus supports this conclusion, in part, by citing research studies documenting that judges agree with jurors approximately 78% of the time.

Most importantly, the McDonald's verdict led to other food chains reducing the temperature of the beverages they serve to prevent the scalding of future customers. The impact on other competitors' businesses to promote public safety is a central theme of Professor Bogus's book. With rapiered argument, he builds the case that the dramatic improvements in automobiles and other areas of product safety are a direct result of common law litigation, which works to supplement regulatory efforts. He makes the compelling point that administrative agencies alone cannot get the job

done for the benefit of the public. He describes the process of "ossification" wherein agencies decline to make a ruling for fear that a court will overturn its rulemaking, consequently relinquishing their initiative to regulate on behalf of the public. Further, some agencies twist in the special interest wind. Even if an agency was to aggressively pursue its mission, it can find itself facing congressional backlash in the form of co-option or the withdrawal of funds, stifling the ability of an agency to act. In this day and age, given the number of dollars pouring into congressional campaign war chests, the common law must supplement regulatory efforts to curb abuses by runaway industries.

Professor Bogus is at his best when he champions the jury system. Noting that funds are now pouring into the coffers of elected judges at various levels in forty-one states, he deftly argues that the jury is critically important, but undervalued. The ballot box, he argues, is not the only place where the public's will is done. Democracy also occurs when a jury votes on what is fundamentally consistent with American values. I cast a favorable vote for that theory.

Never one to duck an issue, Professor Bogus turns to the growth of litigation involving the manufacture and sale of tobacco and guns. One of the hottest debates today concerns the role of personal responsibility in the use of the two items. At first, jury after jury repudiated claims against the tobacco industry on the basis that it was the person's choice to smoke when he should have known smoking was harmful to his health. It was only when arguments akin to comparative negligence were made that jurors began to allocate responsibility to the tobacco industry. This binary obligation, as Professor Bogus calls it, opened the door to successful litigation.

Professor Bogus argues that binary obligation is consistent with already established law, such as state dram shop acts that make bars, along with drunken drivers, liable. This independent responsibility is consistent with public policy that there can be more than one person responsible for an act. Similarly, the professor argues that litigation involving gun manufacturers is even more compelling than the cases holding tobacco manufacturers responsible. Shooting victims, unlike smokers, are generally not the end users of the product. Holding gun manufacturers responsible

is an inherent, externalized cost of gun sales, and thus, a by-product of gun sales is some degree of responsibility.

Why Lawsuits are Good for America is a well-reasoned, articulate book. Like a good trial attorney, Professor Bogus anticipates the counter points and discharges the opposing point of view. Hopefully this work will act as an antidote to those who aim to poison the well of the common law with the telling of tall tales begging unneeded and counterproductive reform.