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Wide View of Tort Reform

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SYMPOSIUM OBJECTIVE

On Saturday, March, 1, 1997, the Pepperdine University School of Law will bring together judges, scholars, and practitioners to address current issues in civil litigation. The goal of the litigation process should be the predictable, fair, and efficient resolution of legal disputes. However, many question whether the litigation process advances these goals. This Symposium will examine various aspects of the civil litigation process, including the efficiency of the appellate process, the role of alternative dispute resolution processes, and the effectiveness of the jury system, discuss the possibility of change in the system, and explore possible institutional and system reforms which will further the goals of reaching just, consistent, efficient, and fair resolutions.

PART ONE

Wide View of Tort Reform

RONALD D. KRIST

Ronald D. Krist is a senior member of the law offices of Krist, Weller & Neumann in Houston, Texas. Mr. Krist is a member of numerous professional organizations and was recently named Dean of the International Academy of Trial Lawyers and admitted into the American College of Trial Lawyers.

After thirty-three years of representing the halt, the lame, the blind, the crippled, the dispossessed, tattered, and disfigured members of society, it is probably from an inescapable bias favoring the plaintiff's perspective that fashions the matrix of my views. On the other hand, my proclivity is somewhat softened by my representation, in recent years, of several Fortune 500 companies. As a matter of fact, but for my corporate clientele and their willingness to involve themselves in a contingent fee compensation scheme, not only would I not have been cited by *Forbes* as one of the best paid trial lawyers in America, but I probably would not have even made honorable mention by way of footnote. Incidentally, *Forbes* has my career on the decline, asserting that I was the seventh highest paid trial lawyer in 1989 only to drift down to the twelfth slot according to their 1995 publication. Disappointingly for me and my heirs, it is feared that *Forbes'* accuracy at estimating income is as flawed as is its stance on tort reform. Having, however, confessed my probable prejudice, even though obviously tempered by the fact that my practice is financially more balanced than many, there is one unassailable truth that I have observed about tort reform through the years, and it does not matter whether we are talking about an astronaut's widow, a major corporate president, a clergyman, a college professor, or a blue-collar worker, the truth is simply this: when it happens to others and they seek redress at the courthouse, it is clearly lawsuit abuse, but when it happens to oneself or one's loved ones, it is a quest for justice that requires filing of the inevitable suit.

Reformation of our tort reparation system is troubling to most of us. What the trouble is depends upon your perspective.

It was once said: A clash of doctrines is not a disaster—it is an opportunity.

Hopefully, an educated examination and analysis of the problem will present us with an opportunity to better understand our tort system and allow us to implement refinements thereof for the betterment of society. Through the years, our tort reparation system has gradually grown, evolving under close judicial scrutiny with very little clamor attendant its development until the early nineties.

Some of the most common notions which have driven the reformation movement are as follows:

(1) There has been a "litigation explosion" by individuals suing businesses in recent years;
(2) Juries tend to have an antibusiness bias and look for ways to punish corporations with "deep pockets" full of cash;
(3) Punitive damage awards are designed to and frequently do punish companies that meant no harm but simply made good-faith mistakes;
(4) Contingency fees fuel litigation and are basically a bad means of delivering legal services; and
(5) Because of plaintiff lawyers, society is the real victim.

Let's examine these beliefs and determine whether they are, in fact, true, partially true, or false.

Each side is claiming that the other's contentions are driven solely by money and the greedy quest therefor. A philosophical Chapman reminded us:

> Mere financial dishonesty is of very little importance in the history of civilization. Who cares whether Caesar stole or cheated? The real evil that follows a commercial dishonesty so general as ours is the intellectual dishonesty it generates.

Is there, in fact, a litigation explosion? Deborah R. Hensler, Director of the Rand Institute for Civil Justice, told a seminar of corporate lawyers meeting in San Francisco in 1994: "There is no litigation crisis." Professor Marc Galanter, Director of the Institute of Legal Studies at the University of Wisconsin, found that between 1985 and 1991, aside from asbestos suits product liability cases in the federal courts declined from 8268 cases to 4992 cases, a reduction of more than forty percent. There have been those who claim that one hundred million lawsuits are filed annually in the United States. However, the National Center for State Courts reports that ninety-three million cases were filed in state trial courts in 1992, but twenty million of those were civil cases, and the rest were traffic and other ordinance violations sixty million, criminal cases thirteen million and juvenile adjudications two million. Only nine percent of the civil cases—less than two percent of all cases—were tort cases. The largest category of civil cases, thirty-five percent, was domestic relations. Only four percent of tort cases—less than one-tenth of one percent (1/10 of 1%) of all cases—were product liability cases, and only five percent of tort cases were for any form of malpractice. Fifty-eight percent of tort suits concerned the operation of motor vehicles—cases that have little to

do with tort reformation agenda. A Rand Corporation think tank study indicated that only ten percent of the people who are injured in accidents ever use the tort system to seek compensation. This is hardly symptomatic of a litigious society.

Well thought out and well-funded defense strategies have increased the burden relative to the successful prosecution of a tort action. Notwithstanding the lack of financial parity between victims of misconduct and corporate defendants, if one is to be successful, one must, at least, try to bring a great measure of sophistication and expertise to the arena. These efforts can be equated to large financial commitments. Under our free enterprise system of risk reward, many of the less important tort suits automatically are filtered out of the process. Victims and their counsel simply cannot afford the expense attendant a fair chance of prevailing at trial. This is not necessarily bad inasmuch as a certain measure of social toughness is required, and maybe there need not be a remedy for every wrong. The difficulty in asserting one's right should have that measure of difficulty which discourages the institution of suit and resultant clogging of our dockets over every minor trespass. This is a very difficult area and a hard thing to measure; however, the system should be reserved for the more significant case. Perhaps an expanded small claims court system with elevated jurisdiction and a streamlined methodology would be appropriate.

It is interesting to note in passing that according to the December 3, 1993 edition of the *Wall Street Journal*, in an article entitled *Suits by Firms Exceed Those by Individuals*, almost half of all federal lawsuits filed involved business disputes.

With reference to the notion that jurors are antibusiness and look for ways to punish corporations, that has simply not been my experience at the bar. I find it remarkable that jurors bring so much common sense and so much wisdom to their task as jurors. There is an inherent reluctance for jurors to take money from one litigant and award it to another. I do not believe that jealousy can account for this reluctance, but I do believe it has more to do with a sincere sense of responsibility and a deep-seeded reverence to follow the court's instructions and undertake to disturb the status quo only when compelled to do so by evidence. Moreover, it has been my observation that most jurors, although they are usually instructed concerning having to make liability findings supported upon a preponderance of the evidence (a notion that a fact is more likely to be the case than not) but in truth and in fact, and as a practical matter, it is submitted that jurors, in fact, require a higher degree of proof and rarely return jury verdicts unless supported by clear and convincing

evidence. Jurors realize that corporate defendants are simply entities composed of individuals such as themselves. Jurors take pride in their work, their company's work, and have a far greater inclination favoring and relating to corporate defendants than one might imagine.

One goal of the tort reformers has already been achieved. The vilification of the tort system has been so effective that it is more and more difficult to get a fair and impartial jury. Current juror bias clearly favors the defendant. Rather than look for deep pocket defendants of which to take advantage, most jurors are on the lookout for and frequently expect to find undeserving plaintiffs represented by overreaching shysters. The defendant rather than the plaintiff is more likely to be viewed as the victim by today's jury.

What about punitive damages? Frequently criticized but rarely granted.

As a practical matter, most sophisticated and experienced trial lawyers are reluctant to submit punitive damages. Damages in the form of exempts are vulnerable on appeal. Most seasoned trial lawyers are unwilling to run the risk that a jury might award the bulk of their damages under the punitive label leaving compensatory damages as the lesser of the jury award. Sustaining punitive damages on appeal is a very dicey proposition at best, and if a jury is inclined to render a substantial award, one would hope it would be in the most sustainable form.

Moreover, as a result of a recent ruling indicating that punitive damages are, in fact, taxable, even fewer cases will be brought seeking their recovery. Enthusiasm over punitives has indeed been greatly dampened.

My friend and current governor of Texas, George W. Bush, Jr., in a statement supporting his stand on tort reform, complained: "Punitive damages are used to terrorize small business owners and force higher and higher settlements." With all due deference to an old friend and fellow West Texan, I disagree.

There are many practical effects, however, that punitive damages do serve and which we should not overlook when considering revision or change in the system. If a defendant is indeed egregiously liable and is fearful that a jury will, if it learns the truth, be offended, such a defendant will shorten the process and seek a quick resolution of the controversy and such encouraged resolution is clearly, at least in part, driven by the threat of punitive damages. This is not bad. It is good. It is consistent with the public policy that encourages settlement. It reduces litigation expense and lessens clogged dockets. Thus, not only do punitive damages serve the commonly recognized purpose of deterring reckless conduct, and it truly, in fact, does, but it also aids in resolving pending or probable litigation. Defendants have no more to fear relative to punitive damages than does an innocent citizen need to fear the criminal laws. Strong criminal laws do not offend law-abiding citizens, but to the contrary, such laws are a source of comfort. So should be the view of

the prudent corporation when it comes to exemplary damages. Corporations do not even have to be reasonably safe in order to avoid punitive damages. They simply have to avoid behaving with an entire want of care and a total disregard for the rights of others. This is not a standard of conduct that asks too much. It is simply a standard that a civilized society should insist upon. Is improvement really needed here? In Ralph Nader and Wesley J. Smith's recent book *No Contest*, reference was made to a professorial study by Michael Rustad of Suffolk University and Northeastern University sociology professor Thomas Koenig wherein they conducted a national study of product liability cases involving punitive damages in both federal and state courts between 1965 and 1990. For the entire twenty-five-year period, these professors could find only a minuscule 355 reported verdicts in which punitive damages were awarded, out of tens of thousands of product liability cases nationwide. Ninety-one of these awards came in the busy asbestos area—where workers have repeatedly obtained relief against companies for cancer-causing workplace conditions—and when those cases were removed there was an average of less than eleven punitive damage cases per year in the entire nation! The professors discovered that, "contrary to tort reform propaganda, punitive damages are awarded only in cases of truly egregious conduct, with most cases involving serious injury or death where the victim was not at fault."

The Rand study also found that punitive damages in business contract cases, which include cases brought by major corporations against business competitors, have become significant. In these business versus business cases, punitive damage awards "were larger and given more frequently."

Consider this: Using the Rustad-Koenig data, the aggregate total of all punitive damage awards in product liability cases between 1965 and 1995 is estimated at $1,337,832,211—$1.3 billion over a thirty-year period. That is less than half of the $3 billion in punitive damages a Texas jury awarded in a single dispute between two oil companies—Pennzoil and Texaco—in November 1985.

In concluding our discussion of punitive damages, suffice it to say, in jury trials in general and with reference to punitive damages in particular, the fear of runaway juries is more puff than fact.

The truth of the matter is that punitive damage awards by a jury are only advisory at best when one considers that such awards must pass muster by the trial court, intermediate appellate court, and supreme court. If the underlying facts do not trigger the harsh and usually insur-

mountable standard required, the awards are set aside. Another way of looking at this area is with the understanding that, in fact, there are three sophisticated and legally trained backup juries who must put their stamp of approval on a punitive award, or any other verdict for that matter, in addition to the trial jury.

I would feel amiss if I did not give credit to the tort reform movers and shakers regarding the deterrent effect those disseminating anecdotal horror stories about punitive damages have had. This has truly scared some otherwise careless companies into being far more careful. America is a safer place as a result of such stories even though many are exaggerated and fictional but for their publication, and we should all be thankful, for that has had its impact and it has been for a positive good.

Many push the theory that it is the lawyers, their greed and contingency fee contracts that are at the heart of the problem. Those who have sought to rewrite, change, and revise our laws under the banner of tort reformation have done an outstanding job of shifting the focus from the victim to a contingent fee lawyer—the latter, of course, being vilified along the way.

The contingent fee—which allows one without financial resources, other than a chose in action, to assert his rights in our judicial system—it is felt, is a reasonable and necessary method of delivering legal services to those among us who otherwise would be without the resources necessary to afford representation. In our free enterprise economy, talent has always been attracted to money. This may sound unprofessional or crass, but it is true. People change careers, occupations, and teams, if you will, daily in response to an opportunity for monetary betterment. The same economic forces apply to the professions. Consequently, highly talented lawyers are attracted to and have been working within our system on a contingent fee basis. These lawyers have the ability to match up well against the well-paid corporate counsel who are compensated, win, lose, or draw. Good lawyers being attracted to the poor but injured of our society is advanced as a result of our informal solicitor-barrister system. Most major personal injury or wrongful death suits end up being handled by outstanding lawyers every bit as good as the most prosperous corporations can afford. A contingency fee system brings parity to the legal marketplace. It would be unrealistic not to suggest that one of the reasons that this is so has to do with the very real fact that the injured claimant can, due to a contingent fee arrangement, pay for the very best our profession can provide. This is as it should be considering the otherwise disparate resources, experts, and experience of the parties.

Very little has been written or said about how attractive today's corporations find a contingent fee arrangement. Companies are tired of long, drawn-out cases upon the conclusion of which they are given a firm hand shake, a six-figure bill, and condolences for having lost the case.

CEOs find comfort, logic, and real economic sense in contingent fees when it comes to their own representation. How much better can they have it in light of what they are accustomed? No downside is attractive, to say the least. Moreover, these companies do not mind paying, and paying well, as long as they win—such a proposition is inherent in a contingent fee arrangement.

Lawyers' public esteem is at an all-time low. We have all seen those lawyers in our everyday lives that just really do not seem to measure up. We are frequently shocked at how poorly read, uneducated, and unprofessional many of them appear. Candidly, these lawyers are really rather benign as far as posing any threat to the establishment is concerned; however, they do pose a harm to those who might seek representation from them. They do not have the talent, resources, or resolve to win a meaningful lawsuit. However, their highest and best use might be to serve as a handy poster person for those interested in tort reform. Perhaps reform in our legal education system is in order. It could be that the rules of admittance are too lax. Maybe the number of those admitted to law school should be reduced and those flunked out should be increased. But having said that, is this a tort reform concern, or one better addressed by legal educators? Surely no one would suggest that it is fair to judge any profession, or occupation for that matter, by the few bad apples that always seem to garner the greatest measure of publicity. Should all ministers be judged by the conduct of the few television evangelists? Would it be fair to judge the content of all athletes' character by examining the character of a few well-known Dallas Cowboys? And the list, of course, goes on and on. No vocation is exempt. The tort reform propagandist, if there is such a thing, has certainly been delivered some slow ones over the middle by us lawyers. Some among us, if one is only willing to paint with a broad brush, have made it so easy to hate lawyers, in general. People want to dissociate themselves from us so much that even a former presidential candidate held us up to public ridicule as "tassel-loafered lawyers," which is mentioned simply to illustrate that that President realized, as have other politicians, that unpopular groups can be publicly chastised for political gain. When it became permissible for lawyers to advertise, a condition was created that transformed a noble profession into a crass hawker-like business, or at least as far as public perception is concerned. There is not a respectable lawyer in the English-speaking world that has not been embarrassed by legal ads—television and otherwise. Abolition of professional advertising is clearly in order. Better trained trial lawyers are direly needed. Perhaps a mandatory internship program with additional exams would be a good

reform—maybe something akin to the solicitor-barrister system is in order. Since we seemingly cannot reduce the number of lawyers, maybe this will, at least, reduce the number of trial lawyers. Maybe a jurisdictionally increased small claims system for the nontrial specialist would take up slack created by the smaller number of those (as they say in England) legally qualified to try larger cases. This lower level court system could utilize streamline procedures similar to what is found today in arbitration proceedings. Sure, there is room for helpful revisions and improvements. But is the real problem one which prompts a call for reform of the lawyers, or are we simply an identifiable group that is easy to hate and thus handy as a tool to help galvanize the system within which the dreadful trial lawyers labor? The truth of the matter is that for all of its faults and conceded room for improvement for which we should all be forever mindful, still we all see every day caring, concerned, and committed lawyers—lawyers who are motivated by the purest of purposes and who, like many in other fields, have reached the pinnacle of financial success as a byproduct of their well-intended efforts and not because financial gain was the nucleus of their drive.

Lawyer bashing has reached epidemic proportions. At the beginning of the assault by tort reformers on trial lawyers, former White House Press Secretary Marlin Fitzwater claimed that even more swipes at lawyers are needed. Jack Anderson published a vitriolic attack on the legal profession entitled *The Tyranny of American Lawyers*. A Berkeley, California, company brought out "gummy lawyers," a chewy candy in the shape of a shark. Each package of four blue shark-shaped candies comes with a booklet purporting to explain the similarities between lawyers and sharks. For example: "Sharks" are equipped with fine senses of smell that allow them to detect "minute dilutions of blood" up to a quarter-mile away—"precisely the distance a hopeful personal injury lawyer will run behind an ambulance to toss a business card," the booklet adds. The booklet further warns: "Like the real thing, they'll leave a bad taste in your mouth." The taste has been described as "solidified Windex."

Forbes magazine said that lawyers such as myself (I was mentioned in the article) are "exploiting the legal system" for financial gain.

A University of Texas economist proffers a correlation between gross national product and the number of lawyers in a nation. His conclusion indicates that the nations with the fewest lawyers (Japan, for example) enjoy the largest GNP. Solution—eliminate the lawyer and increase the GNP. This simplistic approach, of course, ignores other factors that influence an economy or a country's GNP, but it was seriously put forth and eagerly accepted by many.

Some solace is found, however, in statements such as the one that appeared in *Newsday* wherein it was reported that the "war against the lawyers is at bottom a camouflaged aggression against the jury system."

In October 1989, I was privileged to be privy to an audience of His Holiness Pope John Paul II. Unlike the critics, Pope John said: "As trial lawyers, you are committed to the resolution of conflicts and the pursuit of justice through legal and rational means. This work is indispensable for the construction of a truly humane and harmonious social order, as the centuries-old judicial experience of the West bears eloquent witness." His Holiness suggested that "at the heart of this process was a profound conviction, born of faith, that an ordered and just society is a requirement of human nature itself."

My friend, Judge Jim Carrigan of Denver, Colorado, said it differently when he stated:

> Rather than be critical of trial lawyers and the fact that our citizens freely bring their grievances to court, it is felt that this should be a cause for rejoicing, because by the assertion of their rights in court, our people are saying: We believe in the law, we believe in our court system, its integrity and accessibility. Frequently legislatures are powerless to our pleas, for we have no money, no political action committees; and the slumbering bureaucracies of government cannot be wakened by our pleas. What alternative does our citizenry have? The courts are the streets. It's that simple.

So why are personal injury lawyers so hated? Is it that a few, as in every endeavor, have made lots of money? In our society, founded on a free enterprise system, there has always been financial award attendant success. Even *Forbes* finds this admirable in all other legitimate undertakings. Some in our society have accumulated wealth by producing rock records or creating paintings. Likewise, many lawyers have acquired wealth by rising above the ranks of others, and shouldn't it be so if done honestly and honorably? Is it because our customers do not receive anything material in exchange for the charged fee? What do personal injury lawyers build? A safer land? Through good lawyers' efforts, people are no longer being incinerated by post-crash fires following minimal rearend collisions or squashed by flimsily designed roofs in low-speed overturns. What relief would have been forthcoming had victims called their congressmen or bureaucrat rather than their lawyer? Dalkon shields were removed from the market by lawyers who could administer the financial whip on the irresponsible boardrooms that were more concerned with the bottom line than safety. Every aspect of our lives is safer due to good lawyering—from asbestos to birth control pills, from road construction to air safety. The lawyers' work, specifically the tort lawyers', has had its influence. We have served as the watchdogs, if you will, of safety. Our policing powers are the most efficient known to any society on earth. No, our stock in trade is not anything you can hold or see. We deal in sturdier stuff—freedom and the ability to fight back—all done

free of governmental intervention or bureaucratic nonsense and without taxpayers' assistance. We provide, or attempt to provide, parity to the system. Might is not necessarily right due to the lawyers. We are the enforcers of the rules; and without effective enforcers, the rules are useless and toothless.

So should we, as Shakespeare suggested, kill the lawyers or more mercifully, economically eliminate them? It will be alright if we are willing to presume that the wealthy will fairly treat the poor, the poor, of course, being without recourse if they do not. It will be all right if we are certain the police will never mistakenly accuse an innocent man.

It is okay if we are willing to accept the consequences of shoddily built, defectively designed products that render the users crippled but without recourse. A good riddance if we are never to be in need of a defender who would be willing to take the unpopular cause, clash with the monied establishment, or defend the individual over the interest of government.

Lawyer Daniel Webster said that "Justice . . . is the great [concern] of man on earth." It is certainly the greatest concern of every good lawyer I have ever known.

It has been said, "With most people, unbelief in things is founded upon blind belief in another." And so it probably is with me. Consider, however, that a man is largely the sum total of his experiences, and you were forewarned about mine at the outset.

Thank you.