

UNITED STATES TORT REFORM WARS

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In the United States ('US'), for three decades, advocates on behalf of business and professional interests have been claiming that American tort law is out of control, imposing unjustified costs on defendants amounting to billions and billions of dollars annually. American juries, which decide most torts cases, have been attacked as either wholly unpredictable or else predictably pro-plaintiff in their verdicts, as incapable of fairly resolving complex and often technically difficult issues presented to them, and as all too willing to award enormous sums to victims for 'pain and suffering' and 'punitive damages'. Further negative consequences of American tort law are said to be both the undermining of US business efforts to compete in the global marketplace and the discouraging of technological innovation on the ground that enterprises find it foolhardy to risk introducing new products for fear of potential tort law-induced bankruptcy. Still other perverse effects attributed to American tort law are the unwillingness of many physicians to practice types of medicine, such as obstetrics, because of the medical malpractice insurance costs faced by such doctors, and the waste of precious health-care resources caused by physicians who engage in 'defensive medicine' by ordering expensive, but medically unneeded, tests that might possibly help fend off a future lawsuit.

Lawyers representing plaintiffs offer counterarguments to all these assertions. They strongly defend the jury as a vital American institution, viewing jury-based US tort law as a crucial form of consumer protection against the callous exercise of economic might by business interests who put profit ahead of safety. Large jury verdicts are said to properly reflect an easily affordable award of well-deserved compensation to people who have suffered terrible injuries. Victim advocates point out that the imposition of punitive damages is actually rather uncommon, and argue that, even if the instances in which they are awarded are a bit unpredictable, in a world in which not all egregious forms of misconduct can be identified and punished, unpredictability actually helps to keep management on its toes. Those representing victims also emphasise that plaintiffs do not actually win a disproportionate share of jury trials (especially if auto accident cases are disregarded) and that, according to one famous study, judges largely agree with the decisions made by juries, so that, if judges were left to decide

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cases without juries, they would favour victims about as often as juries do.¹ Defensive medicine in the form of an enhanced concern for patient needs and more careful diagnosis and treatment is much welcomed by patient groups. Undesirable physician behaviour is blamed, not on tort law, but on the US's failure to have a modern national health insurance system. And the development and marketing by American companies of a tremendous range of new high tech products from pharmaceutical drugs to advanced aircraft is seen to belie defence-oriented assertions about tort law cramping innovation.

Defence-oriented tort reform efforts have been prompted, at least in part, by earlier plaintiff gains. Throughout the 1960s and into the 1970s tort law became increasingly pro-victim. First, the reach of negligence law was much broadened. Not only were many rules that previously strictly limited a defendant's 'duty' overturned, but also commercial actors were given new duties to take affirmative steps to protect their customers from harms caused by third parties. Second, the acceptance of 'enterprise liability' thinking meant that liability without fault was imposed on the makers of defective products and on an increasing number of behaviors labelled 'abnormally dangerous' activities. Third, an increasingly talented plaintiffs' bar proved itself capable of winning larger and larger damage awards from juries. Finally, victim groups achieved success on the legislative front. Most important there was the overturn in nearly all States of the old rule that contributory negligence was a complete defence, and its replacement with comparative negligence law. This new regime, at a minimum, assures substantial compensation to a victim whose minor fault combined with the greater fault of the defendant to bring about the victim's injury.

Upset by these trends, defence interests began pushing back, and tort reform quickly became a largely politically partisan matter. Republicans lined up with the business community on the defence side, and Democrats lined up with plaintiffs, especially as plaintiff lawyers became among the most generous contributors to Democrats' political campaigns nationwide.

Defence interests have mounted a multi-pronged effort, seeking both to make tort law generally more favorable to their side and to restrict the ability of juries to make blockbuster awards in individual cases. One strategy has been to try to influence judicially-determined common law developments. Because elected Governors in most States play key roles in appointing judges, especially to the State appellate courts, political pressure has mounted on Republican Governors to appoint judges who are pro-defendant. In the media, well-funded pro-business campaigns have widely publicised complaints about tort law. Although causal connections are difficult to establish, the upshot has been that, starting in the 1990s, many State courts have become less pro-plaintiff in their decisions. Moreover, lawyers for victims argue that pro-business efforts have also influenced jury attitudes, claiming that their clients now often receive lower tort damage awards than they would have won in the past for the same injuries.

A second strategy has been to carry the tort reform campaign to State legislatures, with the result that lawmakers are increasingly intruding in a pro-

1 Harry Kalven Jr, 'The Dignity of the Civil Jury' (1964) 50 *Virginia Law Review* 1055.

defence way on what traditionally has been an almost entirely judicially-created common law system. Alongside broad-based pro-business groups, other defendant special interests have also pushed their own narrowly tailored agendas for tort relief. Physicians are the most important example, but by no means the only one. The alcohol, tobacco, and gun industries have also pushed narrow tort reform laws, as have municipal governments and privately owned public utilities.

A portion of this legislative crusade has focused on liability rules. For example, in some States defendants have obtained reduced legal obligations for those who own land used for recreational purposes and lessened legal duties for providers of alcohol.² But the most significant legislatively-based tort reform effort has concerned the law of damages, as defence groups seek to curtail the ability of juries to make huge awards. Four examples will be highlighted here.

One defence goal has been to rein in awards for pain and suffering. Although it might be fairer to cut out pain and suffering for small claims, tort reform has been directed at the other end, generally imposing a dollar ceiling on awards for non-economic loss. These limits, enacted in about half of the 50 States, try to curb recovery for the most seriously injured and do not seem intended to lower awards in cases below the ceiling — as a more structured scale might.³ Of course, the impact of a ceiling is likely to be very different if it is US\$875 000 (as originally adopted in New Hampshire)⁴ as compared to US\$350 000 (Maryland).⁵ A majority of pain and suffering limits apply only to medical malpractice cases (California's ceiling is US\$250 000).⁶ In some States, courts have voided these ceilings on pain and suffering awards as unconstitutional violations of the right to a jury trial or as a denial of 'equal protection' of the law.⁷

A second defence strategy for reducing jury awards has been to reverse the traditional 'collateral sources' rule, which ignores victims' other sources of compensation in deciding how much plaintiffs should recover in tort. The defence argues that when victims are already compensated from health insurance and social insurance, tort's role should be restricted to filling compensation gaps. Nearly half of the States have adopted collateral source rule reforms, although

2 See generally Stuart J Ford, 'Comment, Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges' [1991] *Wisconsin Law Review* 491, and Sharon E Conaway, 'Comment, The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability' (1988) 82 *Northwestern University Law Review* 403.

3 For details, see American Tort Reform Association, *Noneconomic Damages Reform* (2002) <<http://www.atra.org/show/7340>> at 22 October 2002.

4 See *Brannigan v Usitalo*, 587 A 2d 1232 (NH 1991) striking down the limit on non-economic loss.

5 MD CODE ANN § 11-108 (2002).

6 CALIF CIVIL CODE (West) § 3333.2 (2000).

7 As in New Hampshire, American Tort Reform Association, above n 3, and in Washington, see *Sofie v Fibreboard Corp*, 771 P 2d 711 (Wash 1989). See also *Best v Taylor Machine Works*, 689 NE 2d 1057 (Ill 1997) and *State ex rel Ohio Academy of Trial Lawyers v Sheward*, 715 NE 2d 1062 (Ohio 1999) for even more sweeping holdings that tort reform of damages law is unconstitutional under the relevant State constitutions.

many statutes merely require that juries be told about such sources,⁸ mysteriously leaving it up to juries to decide what to do with the information.

A third way to limit tort burdens placed on deep pocket defendants has been to try to overturn the principle of joint and several liability. Solvent defendants are especially irate about cases where a 5 per cent at fault defendant pays 100 per cent of the damages because the 95 per cent at fault defendant is judgment proof. Some States have responded by eliminating joint and several liability altogether.⁹ Others decided that defendants are proportionately liable only when their fault is minor. California voters (through the initiative process) decided that defendants are jointly and severally liable for economic losses but not for pain and suffering.¹⁰

A fourth plank in the defence platform for limiting awards has been to restrict the jury's ability to impose punitive damages. Several States have adopted stronger verbal thresholds for the award of exemplary damages.¹¹ Others have tied punitive damages to the level of compensatory damages awarded.¹² Some have required that some or all punitive damages awards be paid to the state and not to the plaintiff. Finally, a few new States have joined others that simply forbid the award of such damages.¹³

After 30 years of fighting, although most States have engaged in some statutory reform, the overall pattern across the nation is something of a crazy quilt, with different States adopting very different parts of the defence package.

Not satisfied with State-level efforts alone, defence interests have successfully urged Republican Presidents, especially President Reagan, to use the presidential pulpit to attack tort law and to call for reform. For years, business interests have tried to convince the US Congress to pass a pro-defendant product liability bill that would supercede individual State laws. Among other things, it is hoped, this law would curtail what the defence side sees as unfair existing practices by which plaintiff lawyers forum shop, bringing cases in what are said to be obscure, but extraordinarily pro-plaintiff, communities whose financial well being is actually dependent upon local juries continuing to make very large awards to victims. The defence side came closest to victory at the national level near the end of the Clinton presidency when Republicans controlled the legislative process. But President Clinton successfully vetoed that product

8 For information on 21 States that have enacted a variety of changes in the collateral sources rule, see American Tort Reform Association, *Collateral Source Rule Reform* (2002) <<http://www.atra.org/show/7344>> at 22 October 2002.

9 For details as to the 33 States that have made changes in the law regarding joint and several liability, see American Tort Reform Association, *Joint and Several Liability Rule Reform* (2002) <<http://www.atra.org/show/7345>> at 22 October 2002. For the American Law Institute's analysis and recommendations on this issue, see American Law Institute, *Restatement of the Law Third Torts: Apportionment of Liability* §§ 20–29E (2000).

10 California's Proposition 51, adopted in 1986.

11 These include requiring proof of 'reckless disregard' or 'malice' or proof by 'clear and convincing evidence'. See American Tort Law Reform Association, *Punitive Damages Reform* (2002) <<http://www.atra.org/show/7343>> at 22 October 2002 for details.

12 The 12 State statutes that have tied levels of punitive and compensatory damages are described *ibid*.

13 The States now not allowing punitive damages appear to be Louisiana, Massachusetts, Nebraska, New Hampshire and Washington. See *ibid*.

liability law.¹⁴ Although some other minor personal injury law reforms have been enacted at the national level,¹⁵ most of the real change, as described above, has been the rather ad hoc reforms adopted from State to State.

Viewed from academia, many of us who are critics of American tort law have been dismayed by the openly politically partisan drive to take away victims' rights. I believe that the US would benefit greatly from adopting a comprehensive auto no-fault plan modelled after Quebec's,¹⁶ and even more from enacting a sweeping accident compensation scheme that draws upon the best of the New Zealand experiment.¹⁷ Yet, consumer support for these reforms has dried up. Instead, because they view defence-side tort reform efforts as reflecting, not the public interest, but crass self-interest, consumer groups understandably spend their energy countering immediate political threats to an admittedly imperfect system.

14 President Clinton vetoed the *Common Sense Product Liability Legal Reform Act of 1996* HR 956, on 2 May 1996. The House of Representatives attempted to override the veto on 9 May, but the vote was 258 for, 163 against, less than the two thirds needed.

15 For example, modest protections have been adopted on behalf of small aircraft manufacturers, donors of food to non-profit organisations, and various health centres serving the poor.

16 Stephen D Sugarman, 'Quebec's Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow' (1998) numero special *Les Cahiers de Droit* 109.

17 Stephen D Sugarman, *Doing Away With Personal Injury Law* (1989).