The Free Congress Commentary

The Next Conservatism # 37 - Tort Litigation Reform

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That oft-cited standby of lawyer and layman alike, *BLACK'S LAW DICTIONARY*, contains almost three small-point columns defining kinds of torts. Suffice it to quote the first, and basic, definition: "A civil wrong for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction."

In simpler and more pragmatic terminology, that means if one harms another or another's property and does so negligently or grossly negligently, or sometimes merely when one had a "last clear chance" to avoid the harm, one has committed a tort, and, hence, is a tortfeasor. It isn't necessary that the tortfeasor concurrently has violated a law (although sometimes he has).

Torts lead to litigation. As Hamlet (and lots of others) said, "Ay, there's the rub." As the multibillion dollar fiasco of tort litigation gone wild spreads like an economic and cultural "dumb-down" version of the deadliest Medieval plague, conservatives must lead the charge - and a rather militant charge at that - in attempting reform. Fortunately, if adequately organized, there are millions of Americans who do not think of themselves as conservatives, or often as of any other "label," who would join the cause.

Hyperbole becomes reality in evaluating the cost in dollars, to the social order and to the culture of the spread of this ubiquitous virus. No measure is easy to quantify. Perhaps the least difficult is the economic. The most recent Tillinghast Survey (March 16, 2006), for

example, estimates the gross cost to Americans of torturous damage to have been $ 260 billion in 2004, projected to rise to $ 315 billion in 2007. For irrelevant reasons (relating to Tillinghast's inclusion of types of costs) the estimate arising from litigation probably is nearer 43%, or $ 112 billion, yet a staggering and unacceptable sum, higher as a GDP percentage than that of any other country.

The cost to the culture and social order, as noted, is the more difficult - indeed, probably impossible - to quantify. It is obvious to those who look about that there is a rather pervasive victimization mentality: If some ill fate befalls me, wholly or mostly not my fault, somebody must pay me - and pay me big time. Never mind that maybe it was nobody's fault.

We all read about the staggeringly large jury verdicts which jurors return and judges, at times only because required to do so, sustain. Somebody smokes himself into cancer; it's Big Tobacco's fault. A baby is born defective; it's the obstetrician's fault. Somebody drives recklessly, something mechanical fails in the combination of speed and other recklessness; it's the manufacturer or the dealer's fault. A patient acquires an imperceptible staph infection at the hospital; it's the hospital's fault. A compulsive or indiscriminate eater eats himself into obesity or illness; it's the restaurant, drive-in or other merchant's fault. Somebody takes ill from asbestos exposure before science discovered the risk in asbestos; it's the fault of the distributor, homebuilder, end-user, whoever. So on. Of course, there may be exceptions but the exceptions are so rare as to be statistically insignificant.

Whether individual actions (that is, plaintiffs suing) or class actions (that is, large numbers joined together by plaintiffs' lawyers to sue), the claims abound. Billions are paid out by insurance companies (raising premiums for all of us); more billions are handed out by jurors, the so-called "Trial Lawyers" (that is, plaintiffs' contingency-fee attorneys) not uncommonly raking in more than the plaintiffs. Goods and services cost more; shareholders, the employed and the self-employed all net less income.

Who are these jurors? It's not "politically correct" to characterize a group of people. Yet in analyzing a group, as distinguished from

analyzing individuals, some profiling is essential. Jurors in these civil tort cases must pass investigation by, and usually Q&A ("voir dire") with, the attorneys trying the case. Plaintiffs' contingency-fee attorneys by and large are a competent coterie, especially skilled at analyzing, and playing to, jurors. People-skills are vital; many of them are "working psychologists." The ideal plaintiffs' tort juror is (1) a sympathetic or charitable individual - "good" guy or gal; (2) susceptible to a skillful emotional pitch; (3) without demanding employment, hence able to sit through days, weeks or months of testimony (often retired or a worker whose employer pays him or gives administrative leave); (4) somewhat low on the assets and income scale - and more particularly, with scant comprehension of the value of huge dollars; (5) inexperienced in business, medicine or whatever the defendant's activity; and (6) somewhat intelligent but not bright enough to see through to the realities, much less to understand anything sophisticated, technical or otherwise complicated - a person nobody would hire to perform a task related to any profession, skill, technology, business or pursuit involved in the tort case.

When the Framers provided in the Constitution, Article III, § 2, and Amendments VI and VII, for jury-trial rights, they did so in the context that most Colonial and English jurors had been, and would continue to be, responsible citizens of some substance, often landowners - the trite phrase, "one's peers." Furthermore, life was simpler. They likewise legislated in the prevailing context that a judge had considerable discretion in speaking to the jury.

The biggest single stumbling block to civil justice is the standard of proof. In a criminal case it's proof beyond a reasonable doubt. In a civil case it's merely a preponderance of the evidence - i.e., the plaintiff "victim" churns up a little more evidence than the defendant. The adjective "punitive" indisputably refers to punishment. Punishment derives from criminal, not civil, conduct. Thus, in effect if not in nomenclature, a tort defendant is convicted as though a criminal yet he often has violated no law, never is entitled to the presumption of innocence and is assessed "punitive" damages as though he were a criminal - and all upon the basis of a mere preponderance of the evidence.

The next biggest stumbling block is excessive damages. The Federal Judiciary, and more particularly the Supreme Court of the United States, have tried to downsize damages but the result is only modestly helpful, often inapplicable - and much of the problem is not the judiciary's business anyway but that of legislators.

A third, and much lesser, stumbling block is the unrealistic limitation upon a trial judge's role. In probably every other country, including England (whence derives our jurisprudence), a judge can comment to a jury upon the evidence, sometimes even upon the reliability of a witness, sometimes with no limitation other than the judge's ultimate instruction that the jurors must make up their own minds. By contrast, the voices - even the gestures and body language - of American judges are curtailed to almost nothingness.

These rectifications of the rampantly reckless tort system must derive from Federal and State legislation and, in some instances, from State constitutional amendment. The next conservatism must seek to return reality to tort litigation. Basic fairness and our economy in an increasingly competitive world demand it.

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