



Free Congress Foundation Commentary

The Major Incurable Disease – Tort Terror

By Marion Edwyn Harrison, Esq.

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Unlike other countries, our Federal system and many of our State judicial systems encourage litigation against physicians and hospitals. The practice of medicine is almost unimaginatively sophisticated, as applicable knowledge continually becomes more complicated and more extensive.

This commentary addressed the subject on February 22, 2007, text attached. No need to repeat. Aspects of the subject are also addressed in commentaries on the www.freecongress.org website - February 3, 2009; November 2 and August 26, 2008. Yet there is another development - or at least a recommendation for a development.

The Congressional Budget Office (“CBO”), almost always objective and persuasive, responding to a request from Senator Orrin G. Hatch (R-UT), on October 9, 2009 addressed an aspect of the subject of medical-malpractice litigation - cost. CBO calculates that tort reform could save \$ 54 billion in Federal spending over the ensuing ten years.

The present system, alone in the world, runs up tremendous insurance costs for medical providers. These costs dramatically slice providers’ income while dramatically increasing costs to patients and taxpayers. The system also creates an avalanche of medical procedures which aren’t medically required but are strictly defensive medicine, to minimize litigation.

The CBO letter states, realistically and somewhat passingly: “. . . Broader reforms, such as the establishment of specialized courts or different standards of evidence, have also been discussed, but they have not featured as prominently in legislatively proposals . . .” Indeed, they scarcely have been proposed, much less prominently featured.

Forms of legal redress and plain common sense are not always opposites. Alas, how opposite they are in the law of torts as applied to the practice of medicine.

No profession, discipline, science or technique among those ubiquitously involving the public at large is as complicated and sensitive as medicine. Does it not defy common sense, therefore, that an alleged - whether real or imaginary - act of medical malpractice should be subject to adjudication by a jury of the medical ignoramus in a court of law? Worse yet, that a mere preponderance of the evidence - that is, more admissible plaintiff's evidence than defendant's - is all that is required to sustain a judgment? More worse yet, that gross punitive damages - yes, punishment - can be assessed even though the trial is civil, not criminal; no crime has been committed; and the burden of proof is merely a preponderance of the evidence, not proof beyond a reasonable doubt as required in a criminal case?

In sum, if patients' cost of medical care, taxpayers' cost and other monetary drains are to be reduced, the entire system must be changed. A form of specialized review, upon a very strong showing subject to review before a specialized non-jury tribunal, must be substituted. However, the contingency-fee lawyers, the so-called trial lawyers, are so politically powerful that the likelihood of major reshaping is most unlikely in Federal court litigation and in almost all State litigation. A few States have legislated award caps and tinkered with standards of evidence. In the spirit of that hallmark of the Constitution called federalism, States should move beyond caps and standards of review to try a complete change of the litigation system. Although most medical-malpractice litigation is in State courts Federal legislation could be helpful yet nothing is included amid the 1,500 pages of the pending Baucus Health-Care Bill.

Meanwhile, CBO expertly calculates the cost to taxpayers of continued tort terror. Is \$ 54 billion a mere pittance amid an unprecedented national debt of about \$ 1.5 trillion?

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***Free Congress Foundation Commentary
When Civil Trials Become Criminal Trials – An
Opportunity for Further Federalism
By Marion Edwyn Harrison, Esq.***

February 22, 2007

The day before yesterday the Supreme Court of the United States, 5 - 4, decided *Philip Morris USA v Williams*. Media coverage isn't as pervasive as that of Anna Nicole Smith's death but it is extensive. Therefore, anybody interested in dramatic high-dollar litigation knows that the Supreme Court of the United States reversed the Supreme Court of Oregon. The Oregon court of last resort had upheld an award of \$ 821,000.00 in actual damages and \$ 79.5 million in punitive damages to the widow of a gentleman whose death was caused by heavy smoking. A jury found that Philip Morris had advertised in such fashion as to cause the decedent to believe it was safe to smoke.

This is not the forum to analyze the merits of the case. This column has discussed aspects of tort fiasco on August 17, 2005; April 3, 2006; February 8, 2007 – all e-mailed and posted on the FCF website, www.freecongress.org. Suffice it to say that the plaintiffs' contingency-fee attorneys or "trial lawyers" - the John Edwards and his colleagues type of attorneys - litigate these kinds of cases. The cases typically are long on emotion, of questionable substance, and very often far-fetched on the facts. For example, in this case,

assuming the company misleadingly advertised, should not the chain smoker have had the common sense to mention to his physician that he chain-smoked or to read the widely publicized material on the subject? If the facts warrant judgment for the widow, isn't \$ 79.5 million in punitive damages, roughly a 100 - 1 ratio over actual damages, out of line?

The Opinion of the Court and the three Dissenting Opinions are interesting but none addresses what might be termed the underlying issue: Should a civil trial behave like a criminal trial and award punitive damages?

The applicable state of the law is such that all four Opinions properly refrained from discussing that subject. All four discuss the controlling issues. The key issue among them essentially is whether the widow of the unfortunate gent is entitled to punitive damages based not upon punishing the cigarette manufacturer for falsely advertising to that gentleman but rather for falsely advertising to some unquantifiable and mostly unknown number of other smokers, none of them a party to the litigation.

As noted above, no Justice wrote about, or under the state of the law should have written about, the underlying, or sine qua non, issue: Are punitive damages allowable in a civil action?

By definition "punitive" damages are punishment. The immediate purpose of a criminal trial is to punish when there is a conviction. The purpose of a civil trial should be to award damages if the plaintiff prevails. The burden of proof dramatically differs. For a criminal trial, it's guilt beyond a reasonable doubt; for a civil trial, it's a preponderance of the evidence (in other words, greater convincing and reliable evidence than the other side offers).

Our American civil litigation, almost uniquely in the world, is confused in that a civil defendant can be (in effect) convicted by merely a preponderance of the evidence whereas a criminal defendant only can be convicted by evidence beyond a reasonable doubt.

A variation of punitive damages derives from English law (known there as exemplary damages). The state of our law is a matter for

federalism. That is, each State has authority to abolish punitive damages in civil litigation. New Hampshire has done so. Some others have limited the quantum or otherwise legislated restrictions. Any State legislator or governor who attempts to abolish or to limit punitive damages is besieged by contingent-fee or “trial” lawyers, their lobbyists and their gigantic bankrolls. In short, rectifying the law is no easy sell. But every State seriously should consider its law.

Meantime, the Federal Trade Commission does have jurisdiction over significant false and misleading advertising in interstate commerce. More important, all of us should be more skeptical of, and enquiring about, the mass of superficial, irrelevant and often false advertisements which permeates all forms of our media.

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