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# Procedural Tort Reform

## Lessons from Other Nations

**David E. Bernstein**

**B**y all reasonable measures, the American tort system is a disaster. It resembles a wealth-redistribution lottery more than an efficient system designed to compensate those injured by the wrongful actions of others.

Modern product liability litigation is particularly problematic. As has been well documented elsewhere, product liability lawsuits have made a few plaintiffs' attorneys and their clients rich. At the same time, meritless lawsuits have driven safe products, such as the morning sickness drug Bendectin, off the market, and have almost destroyed the contraceptive and vaccine industries. Plaintiffs' attorneys' most recent "success" was coercing a multibillion dollar settlement in the ongoing breast-implant litigation, despite an utter lack of scientific evidence supporting their claims.

The proliferation of such unfounded lawsuits has created an understandable fear of the tort system among businesspeople. This fear, in turn, affects their political priorities. Instead of concentrating on support of deregulation at the federal level, business lobbyists are far more concerned about reining in the tort system. They (correctly) see modern tort law as a particularly inefficient, irrational, and onerous form of state safety regulation. This leads many industry asso-

ciations to favor giving federal agencies *more* regulatory authority, as long as it comes at the expense of the tort system.

Pesticide manufacturers and medical device manufacturers already benefit from federal preemption under the Federal Insecticide, Fungicide, and Rodenticide Act and the Medical Devices Act. Such preemption protects those industries from many tort suits. The food and drug industries, among others, would like similar protection. As long as corporate America thinks that it can potentially gain more from federal preemption than from deregulation, its representatives will refuse to join any serious deregulation movement. The success of federal deregulation efforts therefore depends to some extent on whether tort reform succeeds.

As Paul Rubin explained in the most recent issue of *Regulation* ("Fundamental Reform of Tort Law," *Regulation*, 1995 No. 4), the best way to limit the damage caused by the tort system would be to limit its scope. Many tort claims should not be in the tort system at all, but should be resolved based on provisions contained in *ex ante* contracts. These contracts would determine the scope of the seller's liability and provide for efficient means (such as arbitration) of resolving disputes over oft-contested issues such as causation. Unfortunately, such contracts are rare today because courts will usually refuse to enforce them.

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Sensible procedural reforms can mend the tort system even without restricting its scope. One way to find out what reforms are valuable is to examine the tort systems of Commonwealth nations such as the United Kingdom, Canada, Australia, and New Zealand. Commonwealth legal systems share the American system's underlying, common-law basis, but have managed to avoid the enervating litigation virus, particularly in the tort area, that currently plagues the United States.

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New Zealand has taken the radical measure of replacing its tort system with a no-fault accident-compensation system, paid for by a tax on employers and, to a lesser extent, wage-earners. As summarized by Lewis N. Klar of the University of Alberta, the New Zealand system implicitly rests on the following questionable ideological premises: "First, the community has the responsibility to restore to full productivity all members of society who have become disabled. Second, everyone in society should have the same eligibility to compensation benefits without differentiation. The fact of being disabled is in and of itself a sufficient justification to the entitlement of publicly funded compensation benefits. Accordingly, wrongdoers and victims should be treated equally, at least by the compensation system. Both should be entitled to the same compensation."

Ideology aside, some have argued that New Zealand's compensation system is more efficient than an adversarial tort system. While this contention is hotly disputed in the academic literature, practical experience in the United States argues against adoption of a similar system. Previous attempts at instituting no-fault systems in the United States in such diverse areas as Social Security disability, worker's compensation, and auto insurance, have resulted in continued high transaction costs, moral hazard problems, widespread fraud, and opt-out provisions that defeat the purpose of instituting no-fault.

Perhaps because of these cautionary examples, there is little intellectual or public support for replacing the American tort system with a no-fault system.

The tort systems of Commonwealth nations other than New Zealand remain basically similar to the American system, but legal scholars in both the United States and the Commonwealth have taken note of several damaging features peculiar to the American system: (1) civil jury trials prevail in the United States, but have been largely abolished elsewhere; (2) only in the United States is the losing party not responsible for the legal fees and costs of the winner; and (3) American law, unlike the law in most Commonwealth jurisdictions, puts no limits on contingency fees. All of these eccentricities encourage speculative tort litigation, which is perhaps the biggest problem facing the American tort system.

One can define a speculative claim as one whose success depends not on the intrinsic legal merits of the claim, but on fortuity. For example, in many toxic tort and product liability cases, the plaintiffs' causation theory is directly contrary to the overwhelming weight of the scientific evidence. These cases are nevertheless brought by plaintiffs' attorneys who know that the cases have a high economic value because an occasional jury can be persuaded to issue a verdict contrary to the scientific evidence.

Other cases are brought by plaintiffs' attorneys with the intention of engaging in a "fishing expedition". For a minimal investment, the attorney can get all of the defendant's internal documents through discovery. If the attorney gets lucky, there will be a document or two in the company's files that are sufficiently damaging (though not necessarily related to the case at hand) that the attorney will be able to coerce a large settlement.

The law and economics literature tends to proceed on the assumption that if such claims have an economic value, the efficient solution is to preserve a system that permits such claims to be brought. Thus, if a plaintiffs' attorney consistently brings breast implant cases that have a 20 percent chance of success, but are worth \$10 million each, the economic value of such claims is \$2 million.

This theory seems to assume that current methods of determining liability are somehow efficient. In other words, if a plaintiff's attorney perceives a 20 percent chance of victory when a

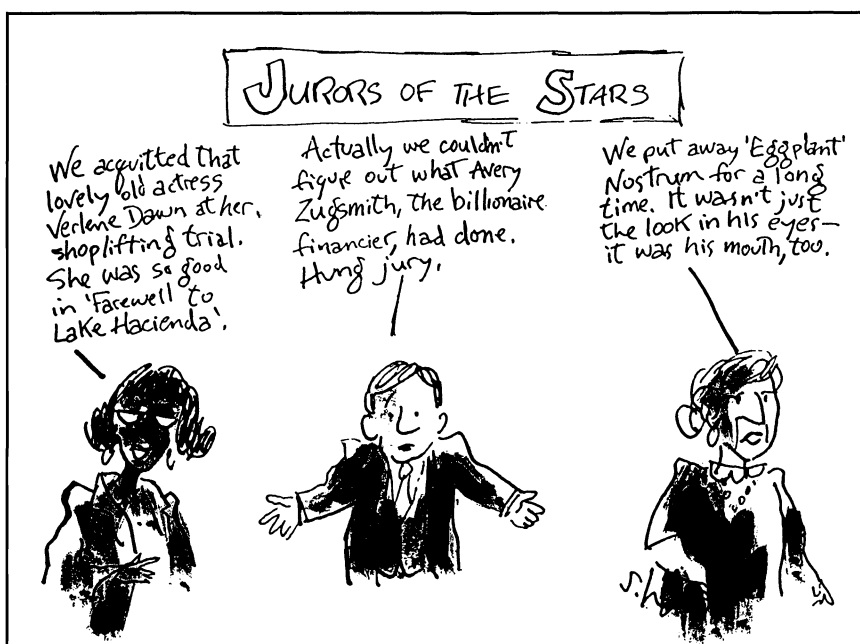
client arrives with a claim, that means that there is a 20 percent chance that the defendant actually caused legal harm to the plaintiff. In our modern tort system, it is far more likely that such claims are completely meritless, and the 20 percent chance of success is a result of the 20 percent chance of finding an ignorant or prejudiced jury, or coercing a settlement from a defendant who fears expensive, risky litigation and potential bad publicity. Such claims may have economic value, but nevertheless should be barred from court.

In any event, standard efficiency analysis is inapplicable to the tort system because tort defendants are not economic actors in the sense of being voluntary parties to a transaction. Efficiency considerations that make sense in the context of a free market do not make any sense when applied to nonmarket situations such as litigation.

The body of this article discusses the problems attendant to civil jury trials, the lack of a loser-pays rule, and unlimited contingent fees in light of the contrasting experience in the Commonwealth. The article suggests reforms that would discourage speculative lawsuits, while preserving access to the courtroom for those with legitimate claims.

### Civil Jury Trials

Although juries have been responsible for a series of perceived miscarriages of justice in the Rodney King, Menendez brothers, and O.J. Simpson cases, juries can and sometimes do play a vital role in protecting criminal defendants from the state. The case for juries in civil trials, however, is far weaker. Indeed, while most common-law legal systems retain the right to a jury trial in serious criminal cases, civil jury trials are rare outside the United States. England began to restrict the use of juries in civil trials in 1933, and Australia, Canada, and Scotland have all followed suit. In England today, the jury is used in less than 1 percent of civil cases.



Juries are a disaster for the civil justice system for several reasons. First, the use of juries to decide civil cases undermines one of the most important values of civil law, certainty. A jury trial, as any trial lawyer will tell you, is a crapshoot; one can never predict what combination of principle and prejudice will motivate the jury.

Juries, moreover, do not and cannot officially explain the reasons for their decisions, so their verdicts have no precedential value. Nor are juries bound by judicial opinions rejecting prior claims based on the same evidence. Plaintiffs' attorneys in the United States therefore find that playing the litigation lottery is profitable: they bring the same dubious multimillion dollar claim before many juries in the expectation that a few random victories will more than compensate for a larger number of losses.

In England, Canada, and Australia, judges alone handle personal injury cases. Unlike juries, judges typically state the reasons for their rulings. Once a judge issues a thoughtful opinion rejecting a dubious scientific claim, other judges will respect that judgment, thus bringing the litigation to a quick end. Judge-only civil trials promote a Commonwealth legal culture that respects precedent and promotes certainty.

The prevalence of inconsistent, almost random jury verdicts in the United States, meanwhile, has had broad negative effects on American legal culture. Certainty is valued so little that judges in other jurisdictions often ignore even well-rea-

soned judicial appellate opinions on virtually identical factual issues. Judicial fidelity to past rulings is considered an eccentricity. When Judge Alex Kozinski of the Ninth Circuit Court of Appeals relied on the sound opinions of three other circuits in rejecting evidence that Bendectin causes birth defects, he faced widespread criticism. Even the attorney for Merrell Dow, the product's manufacturer, defending Kozinski's opinion before the Supreme Court, was reluctant to defend Kozinski's "summary" opinion because it mainly relied on other courts' factual findings.

Aside from the randomness of jury verdicts,

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perhaps the biggest problem with lay juries is that they frequently do not understand the evidence put before them. The most comprehensive study of jury decisionmaking in complex cases to date, conducted by the American Bar Association Section of Litigation, casts doubt on whether jurors can understand complex evidence. The study implies that jurors simply ignore much of the expert testimony presented to them.

Several legal scholars have argued that the issue of jury incompetence is a red herring created by American corporate lobbying groups seeking to avoid liability for damages caused by their products. However, evidence from other common-law jurisdictions supports the assertion that lay juries are not competent to weed out dubious expert testimony. While Commonwealth jurisdictions have mostly abolished civil juries, juries are still used to decide criminal cases. There is growing doubt in these jurisdictions about the wisdom of relying on juries to make decisions based on complex scientific evidence. For example, in the United Kingdom, a Royal Commission on Criminal Justice concluded that lay juries are not equipped to settle scientific disagreements among experts. The chief justice of the Australian Capital Territory Supreme Court has come to the same conclusion. The Canadian

Supreme Court worries that scientific evidence "is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves."

The incompetence of juries to decide complex scientific issues is also recognized in the few common-law jurisdictions where juries still decide civil cases, such as Northern Ireland. The default rule there is that juries hear personal injury actions. However, courts do not hesitate to use their statutory discretion to take matters involving scientific evidence away from juries.

In a 1984 case in Northern Ireland, *Monteith v. Western Health and Social Services Board*, for example, the plaintiff was admitted to a hospital for treatment because of a complaint of high blood pressure. He alleged that his previous drug treatment was withdrawn, causing his blood pressure to rise to a degree that caused destruction of the macula of the left eye and consequent loss of sight in that eye. In the United States, this case would be considered a routine medical malpractice case, and would be decided by a jury. The judge in *Monteith*, however, decided that given the difficulties juries have in comprehending expert scientific testimony, he, and not the jury, should hear the case.

Defenders of juries argue that juries can protect a litigant from rulings based on theories that are accepted by the scientific mainstream but that are not actually scientifically justified. This is a version of the Galileo argument elegantly rebutted by Peter Huber in *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books, 1990). In the context of the tort reform debate, the Galileo argument relies on two premises: first, that there are many scientists whose views are rejected by an obstinate mainstream, but who are nevertheless correct; and, two, that average jurors, using their common sense, aided by the adversarial process, will be able to uncover these hidden geniuses while still rejecting junk science.

While this argument has a populist allure, its proponents cannot explain how lay jurors, who are generally restricted to hearing oral testimony presented in an adversarial context, are competent to decide a scientific controversy. (Judges are not only better educated than jurors, but have a host of institutional advantages, such as their ability to ask for and study written argument, and to consult with outside experts if they so desire.) Not surprisingly, proponents of the

Galileo argument find it difficult to come up with even one example where a string of jury verdicts challenged received scientific wisdom and the juries turned out to be correct. In contrast, examples of juries ignoring sound science in favor of junk science can and have filled entire books, including *Galileo's Revenge* and Kenneth Foster et. al's *Phantom Risk: Scientific Inference and the Law* (MIT Press, 1993).

Even when American juries do understand the scientific evidence put before them, they do not necessarily pay attention to it. For example, in the first Bendectin case that went before a jury, the jury found that the defendant did not cause injury to the child plaintiff. The jury nevertheless awarded damages to the child's parents out of sympathy for their plight.

Jurors' temptation to ignore the scientific evidence put before them may be even stronger when they feel that the defendant deserves punishment, even if the defendant did not cause harm in the particular case. The longest jury trial in American history involved claims that the plaintiffs were physically injured by a dioxin spill. The jurors awarded the plaintiffs only \$1 in actual damages, which reflected their understanding from the scientific evidence presented that the dioxin spill had not caused personal injury to any of the plaintiffs. Nevertheless, the jurors proceeded to award \$16 million in punitive damages.

The Bendectin and dioxin awards were both overturned on appeal. Surely, however, some juries are more clever than the two described above. Such juries similarly base their verdicts solely on prejudice, but structure their awards in favor of the plaintiffs in a way that makes a successful appeal unlikely. A different dioxin jury, for example, might have awarded the plaintiffs \$8 million in actual damages and \$8 million in punitive damages. Such an award would have disguised the fact that the jury's assessment of damages was based on malice and not the scientific evidence presented during trial.

It is true that judges can be willful, political creatures, particularly in states where they are elected officials. Former West Virginia Chief Justice Richard Neely has argued that elected judges have an incentive to favor in-state plaintiffs over out-of-state corporations in product liability cases.

Judges, however, face certain constraints that juries do not. First, as noted previously, judges,

unlike juries, must justify their rulings in writing. A judge motivated by political or other illegitimate considerations will nonetheless need to issue an opinion justifying his result on legal and logical grounds. If the judge cannot do so, a higher court will overrule him. Juries, however, can base their rulings purely on whims, and their verdicts are upheld if the victor can point to any evidence supporting its position.

Judges are also constrained by the fact that their written opinions are publicly available. Even the least-principled judges are usually constrained by concern about their professional reputations. Lawyers generally take a big salary cut when they become judges, but gain the nonpecuniary benefit of the respect and prestige that attends judicial office. It is therefore a rare judge

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indeed who desires to be the subject of negative commentary.

And judges do face criticism for ill-considered opinions. For example, in 1985, federal Judge Marvin Shoob, who was in the unusual position of sitting in place of the jury as the trier of fact, wrote a particularly moronic opinion upholding a plaintiff's claim that a commonly used spermicide caused her child's birth defects. The *Wall Street Journal*, the *New York Times*, *Science*, and other publications pilloried him. Unlike judges, meanwhile, jurors do not have to worry about their reputations. Instead, they gain their utility from a feeling that they "did the right thing," which is not necessarily coextensive with basing their ruling on the law and the facts.

So, as we have seen, juries undermine certainty, are incompetent to decide complex cases, and often base their decisions on illegitimate factors. All of these factors encourage plaintiffs to pursue speculative litigation. Given the problems that civil juries cause, they should be eliminated except in cases where all parties want a jury trial. Unfortunately, eliminating civil jury trials would be unconstitutional in most states. The Seventh Amendment of the U.S. Constitution requires a civil jury in federal trials if requested by any party to the litigation. While the Supreme Court has not applied the Seventh Amendment to the

states, most state constitutions have an analogous provision.

There are, however, ways to limit the damage that juries do without abolishing jury trials. First, courts have the power to grant pretrial summary judgment to either side if the other side is not able to show that there is a "genuine issue of material fact." Following a series of revolutionary Supreme Court decisions in 1986, federal courts, and some state courts, have become far more willing to grant summary judgment.

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Summary judgment has become a particularly valuable tool for defendants in antitrust cases and other complex cases pitting the "little guy" against a large, often out-of-state corporation. The trend toward more frequent grants of summary judgment should be encouraged, including through legislation in appropriate jurisdictions.

Second, courts have learned that the best way to prevent juries from relying on junk-science testimony is to screen out such testimony pretrial. Standards for the admissibility of scientific evidence in civil cases have tightened substantially throughout the United States since the mid-1980s. Even the Texas Supreme Court, once a pro-plaintiff haven, recently abandoned Texas's traditional "let-it-all-in" standard for scientific evidence in favor of the far stricter standards promulgated by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* in 1993. Efforts currently under way by the Federal Judicial Center and other organizations to educate judges regarding scientific issues should improve judges' ability to separate the scientific wheat from the chaff, and therefore encourage them to resolve scientific issues pre-trial. Legislators and judicial organizations might also consider the model adopted in several Australian states, where judges refer scientific disputes to an expert referee who reports to the judge pretrial.

Perhaps the most radical and important measure that legislatures can take to eliminate the pernicious effects of civil juries is to remove the issue of damages from the jury and put it in the

hands of judges. Judges are repeat players with a stake in the coherence of the system, and have some idea of what the "going rate" for certain injuries is. Juries, by contrast, are often faced with sympathetic plaintiffs who were severely injured by large, faceless corporations, and are given almost no guidance about how to make their awards other than what the attorneys for each side suggest. Not surprisingly, jury awards are both far more inconsistent and for much higher amounts than awards by judges. One study shows that in the Republic of Ireland, which allows juries to award damages, the average award is six times greater than in the United Kingdom, which does not.

State legislatures have taken some tentative steps toward reducing jury discretion concerning damages. Some states have placed caps on the amount that juries may award for pain and suffering, a notoriously subjective element of damages. Other states have restricted the award of punitive damages in various sensible ways, including providing for judicial review of punitive damage awards. Three states, Ohio, Connecticut, and Kansas, have passed legislation that continues to allow juries to decide if punitive damages are appropriate, but leaves the amount of damages in the hands of the courts. (The Ohio Supreme Court has declared Ohio's statute to be unconstitutional under the Ohio Constitution's jury trial provision. The court made the remarkable argument that a plaintiff's right to a jury trial includes the right to have a jury assess punitive damages.)

Legislatures should now push forward, and place the issue of damages solely in the courts' hands. Almost no one thinks that the fact that judges and not juries determine sentencing once criminal defendants have been convicted by juries is unfair, much less a violation of the right to a jury trial. Analogously, the amount of damages civil defendants owe should be determined by judges.

**Loser-Pays**

Under the loser-pays rule, which is in effect in almost every common-law jurisdiction outside the United States, the party that loses in court pays the victor's fees and expenses based on a schedule set by the court. The advantages of the loser-pays rule are manifold. Most obviously, it discourages speculative litigation. A claimant

who knows that he is going to be responsible for the defendant's reasonable legal costs is going to hesitate before pursuing a longshot case, even if the potential payoff is large.

The loser-pays rule also discourages plaintiffs and defendants from engaging in excessive discovery and from filing unnecessary motions. Except for the remote threat of judicial sanctions, the American legal system currently does not discourage such activity. Under the loser-pays rule, however, the losing side will ultimately pay for the time the other side wasted in responding to excessive demands. If the loser-pays rule would apply not just to the ultimate success or failure of a claim as a whole, but to each individual cause of action raised by a plaintiff, it would also streamline litigation by encouraging plaintiffs to focus on their strongest claims, instead of throwing everything but the kitchen sink into their complaints as they do today.

Moreover, a loser-pays system is ethically superior to the current system. A defendant who has been dragged into litigation and had his property put in jeopardy deserves compensation for any expenditures made in defeating an invalid claim. Conversely, a plaintiff who has a valid claim should recover full damages, including the legal fees paid in defeating the recalcitrant defendant.

Some have argued that a loser-pays rule would discourage litigants from keeping their costs down. The strongest version of this argument is that wealthy corporate defendants might implicitly threaten to run up their legal bills in order to coerce a settlement from a plaintiff who would bear the costs if he lost.

Few defendants are likely to pursue this strategy. First, fee awards under loser-pays rarely cover the full cost of litigation. This is particularly true for corporate defendants, who tend to hire the most expensive legal counsel. Fee awards are almost always based on a relatively low, set scale. A corporate defendant that over-litigated for strategic reasons would necessarily bear a large part of the costs itself, even if it emerged victorious. And if that is not enough to discourage over-litigation, the fact that fee awards would be subject to judicial review, as they currently are in class actions and one-way fee-shifting cases, would provide further incentives for economy.

In fact, overall the loser-pays rule is likely to discourage improper conduct by defendants.



Currently, defendants who are aware of their liability sometimes purposely delay matters to coerce a reduced settlement from injured plaintiffs who desperately need compensation. Under a loser-pays system, if the defendant ultimately lost the case, it would bear not only all of its own costs, but also a hefty chunk of whatever extra burdens it placed on the plaintiff. The loser-pays rule also helps plaintiffs with legitimate claims by making small claims economically viable. Loser-pays ensures that defendants, not plaintiffs, will be financially responsible for any legal action taken to deny a legitimate claim.

The possibility of moving to a loser-pays system has recently received a great deal of attention in the United States. Oregon and Oklahoma have even undertaken limited experiments with a loser-pays fees system. It seems that it is only a matter of time before broader loser-pays experiments are undertaken.

The danger of a loser-pays rule is that it could reduce access to the civil justice system. While scholarship on the issue does not support the belief that the loser-pays rule discourages many plaintiffs from pursuing legitimate claims,

undoubtedly some risk-averse, middle-class potential plaintiffs are unwilling to risk their savings on anything less than a sure thing.

Insurance is a potential solution to the access problem. In 1995 the Law Society of England and Wales (which is analogous to the American Bar Association) launched an insurance plan, Accident Line Protect, to protect personal injury plaintiffs from liability for their opponents' big legal bills. For a fee of £85 (about \$135) clients will be insured against having to pay their opponents' fees even if their cases fail. The plan also insures clients against having to pay other expenses, such as court charges. Accident Line Protect is not available for expensive litigation

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such as medical negligence cases, pharmaceutical, or tobacco-related actions.

Within one week of its inception, about 70 percent of the 1,300 eligible law firms had signed up for Accident Line Protect. Some prominent members of the bar have expressed concern that the premiums are not sufficient to cover the potential liability. Kenneth Pritchard, secretary of the Law Society of Scotland, reports that "the Law Society of Scotland has been looking at this scheme, but we have serious reservations about its viability."

A private firm, meanwhile, has launched its own insurance program, Litigation Protection, that may be on a sounder financial footing. Litigation Protection charges significantly higher premiums than Accident Line Protect. The cheapest premium offered by Litigation Protection is £175 to cover up to £10,000 in non-medical negligence personal injury cases. But unlike its rival, Litigation Protection insurance will be available for all classes of cases. For example, for up to £50,000 coverage in a medical negligence case, the fee is £4,250.

The insurance schemes established so far in England are problematic. They do ensure that winning defendants will receive compensation

for their fees and expenses, which alleviates the problem of defendants who win their cases but still lose their shirts defending themselves. On the other hand, because the insurance companies are charging a flat fee regardless of the likelihood that the claim will succeed, the insurance programs may be encouraging plaintiffs to pursue speculative litigation, thereby undercutting a major benefit of the loser-pays rule.

Encouraging speculative litigation might not be a major concern in England, where contingency-fees are still banned. But, in the absence of contingency fee reform in the United States, allowing flat-fee insurance against payment of costs and fees could substantially reduce the incentives to avoid speculative litigation, and therefore severely weaken the case for establishing loser-pays in the first instance.

It is highly unlikely, however, that an American insurance system would look anything like the English system. A far higher percentage of American tort cases go to trial instead of settling. This factor would substantially increase American insurers' risks relative to those of English insurers, because under a loser-pays system, cases that settle rarely include a fee award, while almost all cases that go to trial involve a fee award. Moreover, American litigation, with its liberal discovery rules and pretrial depositions, tends to be far more expensive than English litigation, and the costs tend to be far more dependent on individual attorney styles and the particular issue that is being litigated. Because of these factors, American insurance companies that offered insurance for a flat fee would be faced with a severe moral hazard problem. Flat-fee insurance is simply not economically viable under the American system.

Instead, the most likely outcome of a loser-pays rule that allows insurance is that plaintiffs' law firms, which are in the best position to judge their client's chances of ultimately being responsible for fees and costs, would offer insurance to their clients for an additional fee. In cases where a firm is confident of some measure of success, it might offer to loan the client the money for fee insurance, with the plaintiff only required to pay back the loan if the plaintiff recovers damages. Under either scenario, an additional benefit is that the plaintiff's law firm would have a strong incentive not to run up the defendant's legal bills unnecessarily.

Plaintiffs with speculative claims, meanwhile,

would probably not find insurance to be a financially viable option. Law firms representing such plaintiffs would have to think long and hard before agreeing to accept financial responsibility for the fees and costs likely to be expended by the defendants. If the law firm refused to do so, the plaintiff would either have to risk losing and paying the other side's expenses and fees out of pocket, or not litigate at all. Of course, if a speculative claim had a high enough economic value, and the law firm therefore expected a large enough contingent-fee, it might be willing to bear the plaintiff's risk. This brings us to the contentious issue of contingent fee reform.

### Contingency Fees

In the United States, almost all tort plaintiffs hire their attorneys on a contingent fee basis. Plaintiffs' attorneys generally get from one-third to one-half of any damages that plaintiffs win, whether in settlement or at trial.

This fee structure causes two major problems. First, it encourages attorneys to engage in speculative litigation in the hope of landing the occasional large jackpot. As Walter Olson of the Manhattan Institute has pointed out, plaintiffs' lawyers can make the same boast as the Irish Republican Army did when it attempted to assassinate Margaret Thatcher: we only need to be lucky once; the defense must be lucky every time.

The second major problem with contingent fees is that they separate the interests of the client from those of his attorney. Because time is most definitely money in the legal business, it pays the contingent-fee attorney to settle as quickly as possible, as long as he can procure a reasonable settlement. The best interests of the client, however, might lie in more zealous representation.

In fact, the legal culture created by the contingency fee has created a class of attorneys who shamelessly look out for their own pecuniary interests, using clients solely as an excuse to extort money from hapless defendants. In several recent high-profile class actions, the plaintiffs' attorneys agreed to settle the litigation in exchange for millions of dollars payable to the attorneys. Their "clients," meanwhile, received "compensation" that was next to worthless.

General Motors, for example, negotiated a settlement of a class-action lawsuit involving claims that its pickup trucks with side-mounted

gas tanks were fire-prone. GM agreed to pay the plaintiffs' attorneys \$9.5 million; the truck owners were to be given a \$1,000 coupon toward the purchase of a new GM truck. Ford, meanwhile, agreed to settle a class action filed for the owners of Ford Bronco IIs, which contended the vehicles were prone to roll-over crashes. The settlement agreement provided \$4 million for the plaintiffs' attorneys, while the Bronco owners were to be given safety warning materials and inspections.

The problems of speculative litigation and rapacious attorneys would be mitigated by a ban on contingency fees. Some might object that the contingent fee is a voluntary contract, and that regulating these contracts would be an interference with the free market. But contingency fee contracts directly effect a third party, tort defen-

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**Bringing a speculative lawsuit, even one with a high economic value, is an act of aggression. It involves calling on the coercive powers of the state to put the property of another at risk.**

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dants that are coerced into litigation because their property has been placed in jeopardy by the plaintiffs' service of process. Defendants' interest in stifling speculative litigation must therefore be taken into account.

Plaintiffs' lawyers, meanwhile, are given the special nonmarket privilege of being permitted to invoke the legal authority of the state in serving process against defendants. They get this quasi-governmental power because they are officers of the court. As such, they have responsibilities to the legal system as a whole, not merely to the interests of themselves and their clients. The contingent fee question is therefore not simply one of freedom of contract, but whether lawyers as recipients of special legal privileges can be asked to abide by rules that put reasonable restraints on their activities.

On the other hand, some tort reformers go too far when they advocate a complete ban on contracts that in any way condition payment of an attorney's fees on a plaintiff's collecting damages. Recent reforms in the United Kingdom and Australia show that fee restrictions that are less draconian can still discourage speculative litigation while preserving access to the courts for

plaintiffs with legitimate claims.

Until recently, any attorney in the United Kingdom, Canada, or Australia who accepted a case with a fee conditioned on success was technically considered liable for the tort of champerty. (Champerty is a bargain in which a third person agrees to carry on litigation on behalf of a plaintiff in return for part of the proceeds successfully recovered.) Entering into such a contract with a client was therefore considered unethical. Plaintiffs were forced to pay their attorneys' fees out-of-pocket, an expense many could not manage.

In Canada, all provinces now permit contingency fees, except Ontario, where no form of conditional fees is permitted. Canada, however,

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**Tort and contract law, not bureaucratic regulation, should be the primary institutions that protect the interests of the public from involuntary risks and wrongful conduct by others.**

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has largely abolished civil jury trials, removing a major incentive for speculative litigation. Moreover, unlike the United States, Canada has also maintained its loser-pays fees system, which also discourages speculation.

In order to improve citizen access to the civil justice system in the absence of contingency fees, the British government, and, more recently, some of the Australian states, have created a middle-class entitlement of civil legal aid. In order to get this aid, a claimant must meet income requirements and persuade a government panel that the claim is worthy of assistance.

Dissatisfaction with civil legal aid in the United Kingdom, particularly its burgeoning cost, led to legislation passed in 1995 which permits a limited form of contingent fees in personal injury actions. Attorneys may now enter into a fee agreement with plaintiffs which provides no fee if the claim is unsuccessful, but allows the attorney to collect up to double his normal fee if the plaintiff recovers damages. U.K. lawyers have taken to calling these fees "conditional fees," to distinguish them from American-style contingency fees based on the damages awarded, which remain banned.

In Australia, conditional fees of up to double the normal fee are currently permitted in the state of South Australia. New South Wales permits fee uplifts of up to 25 percent. A 1994 report of the Access to Justice Advisory Committee, appointed by the Australian attorney general, argues that the federal government should encourage Australian states that do not permit conditional fee arrangements to provide for an uplift above the lawyer's normal rates. If these states do not do so, the report recommends that the federal government should legislate to allow conditional fee arrangements for matters within federal power.

Several prominent American tort reformers have proposed complicated mechanisms to reduce the costs to the legal system associated with the contingent fee. A better strategy would be to replace the contingency fee with the far superior conditional fee. The conditional fee retains the main advantage of the contingent fee because it permits the poor or risk-averse middle-class claimant to pursue a valid action without concern over the fee.

With a fee uplift of 100 percent, English attorneys have an incentive to take any case on a conditional fee basis that has a greater than 50 percent chance of success. "Success" in this context does not necessarily mean success at trial, but successfully recovering money from the defendant, even if in settlement. Under a conditional fee system then, an impecunious plaintiff will still be able to get legal help so long as the claim is sufficiently viable that an attorney believes that he has at least a 50 percent chance of either winning at trial or negotiating a settlement. An English-style conditional fee system, therefore, does not inherently discourage plaintiffs from pursuing what could even remotely be considered solid claims. On the other hand, because the fee ultimately collected by plaintiffs' attorneys is not based on the damages paid by the defendant, the conditional fee properly discourages speculative litigation.

The American system, by contrast, allows plaintiffs' attorneys to function as investors who spread their risk by bringing many speculative claims that are risky but have high economic value. It is the pecuniary interests of these attorneys that drive fiascoes like the Bendectin and breast implant litigation.

Bringing a speculative lawsuit, even one with a high economic value, is an act of aggression. It

involves calling on the coercive powers of the state to put the property of another at risk. The tort system is necessary because it provides a remedy for the acts of aggression of those defendants who cause injury and are unwilling to compensate their victims. And, given the uncertainty that often prevails regarding the merits of a particular claim, plaintiffs should be given some leeway in bringing claims that are debatable but may very well be valid. The conditional fee provides this opportunity.

But that does not mean that we must tolerate a contingent fee system that encourages speculative litigation based on junk science and fishing expeditions. Other common-law nations, where contingent fees are barred and the loser-pays rule is in effect, have largely been spared from similar vexatious litigation. The United States should follow their lead.

### Conclusion

Given the political power of the organized plaintiffs' bar in the United States, and the forces of inertia, the radical reforms proposed in this article may seem fanciful. Yet, as discussed above, over the past few years legislators and courts have managed to take some measures designed to rein in runaway tort litigation. Some of these measures, such as loser-pays experiments and stricter rules for the admissibility of scientific evidence, are likely to have a substantial salutary effect on the tort system.

Ironically, the American Trial Lawyers Association (ATLA) has tried to use recent congressional deregulation efforts to its public relations advantage in its efforts to defeat further tort reform. ATLA argues that its members are a vital element of a tort system that can protect

society and compensate victims without invoking the heavy hand of government agencies. ATLA has a point. Tort and contract law, not bureaucratic regulation, should be the primary institutions that protect the interests of the public from involuntary risks and wrongful conduct by others. Contrary to ATLA's position, however, this is actually an argument in favor of tort reform. Tort reform is necessary precisely so the tort system can be trusted with the awesome responsibilities that it would undertake in a deregulatory age.

A great deal more needs to be done. Further limitations on jury discretion, widespread implementation of the loser-pays rule, and replacement of contingency fees with conditional fees would each substantially reduce unwarranted litigation. If all of these measures were implemented, the United States would have a rational tort system like other common-law nations, and deregulation at the federal level would no longer be stunted by fear of the tort consequences.

### Selected Readings

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