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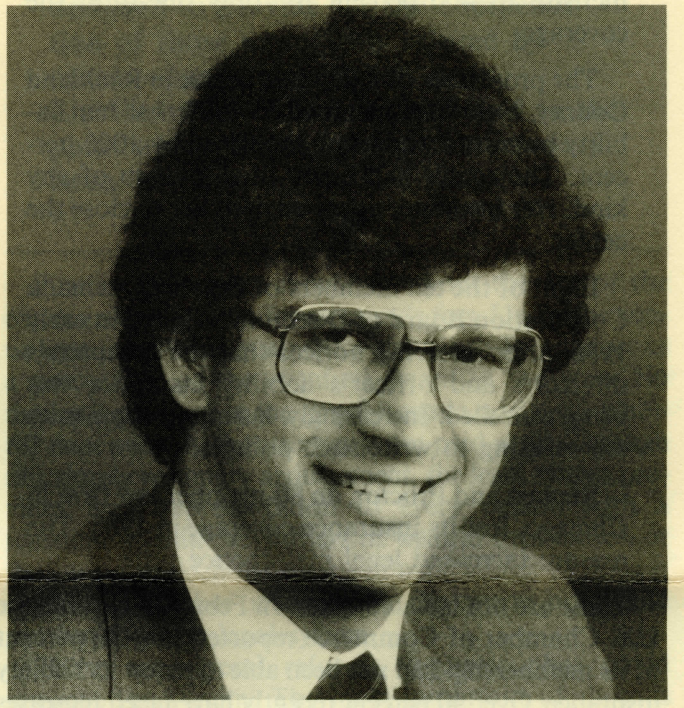
"The Liability Crisis: It's Not Over Yet"

By James L. Gattuso



Editor's Preview: Can you imagine a place where you can sue if your suicide attempt fails? A place where ministers pay thousands of dollars in malpractice insurance in the event that one of their congregation might be dissatisfied with their spiritual guidance? A place where felons can sue their victims and collect? Such a place exists: it is the United States, hailed by many as the most litigious nation on earth.

In the next few issues of IMPRIMIS, we plan to feature essays like this month's selection by Heritage Foundation policy analyst James L. Gattuso. These essays were presented in our seven-part Shavano seminar series, "Courting Disaster," in Traverse City, Michigan; Pittsburgh, Pennsylvania; Boston, Massachusetts; Scottsdale, Arizona; Rancho Santa Fe and Monterey, California; and Hillsdale, Michigan.

Here, in "The Liability Crisis: It's Not Over Yet," attorney James L. Gattuso discusses the scope of the problem and the dangers inherent in some reforms which have already been adopted at the state level.

Foreigners long have remarked on the penchant of Americans to sue each other to redress a grievance. Perhaps no society on earth has been as quick to litigate as the American. Until recently, this was simply an interesting quirk. Now it threatens to damage the American economy seriously and to reduce the goods and services available to the American consumer, while increasing their prices. The very existence of whole industries and countless jobs (if not more) are at risk.

The culprit is the upheaval in the American tort system—that process by which injuries inflicted by one person against another are compensated through the courts. Recent years have seen the volume of litigation increase substantially and the size of awards skyrocket.

Meanwhile, the courts have slowly and steadily increased the number of wrongs compensable through the system and chipped away at the defenses available to defendants. Many of these changes have been to the good, allowing persons wrongfully harmed by others to be fully compensated for that harm and thereby deterring future misconduct. But courts also have allowed compensation to injured plaintiffs even when the defendant's conduct could not reasonably be called wrongful.

The cost of tort law changes long went largely unnoticed. The losers in the system were usually large corporations or insurance companies which, many felt, easily could afford to pay the increasingly large and frequent judgments. Over the last few years, however, the real costs to the U.S. as a whole have begun to bite. Stung by such a costly and unpredictable system, insurers increased premiums dramatically. In many

IMPRIMIS (im'pri-mes), taking its name from the Latin term for "in the first place," is the publication of Hillsdale College's Center for Constructive Alternatives and the Shavano Institute for National Leadership. Circulation 123,000 worldwide, established 1972. Complimentary subscriptions available.

cases, moreover, they have had to drop coverage entirely. What the U.S. now faces is a liability insurance crisis. It affects all segments of society: shopkeepers, hospitals, cities, corporate directors, and even day care centers. Examples:

Schaghticoke, New York (pop. 7,090), has not been sued in its entire history. Nevertheless, this town lost its liability coverage when its insurer, Utica Mutual, withdrew from all municipal coverage. The only replacement policy that Schaghticoke could obtain was at a premium increase of 400 percent for only one-third the coverage.

The proprietor of a day care center in Rockland County, New York, learned in 1985 that her liability premium was being increased by 1000 percent. The center had never filed a claim of any kind. Her insurance agent advised her to close the center.

Eight of the ten members of Detroit's Armada Corporation Board of Directors resigned in early 1986, after receiving notices that the company's director's and officer's liability insurance was being cancelled. Increasingly, insurance companies are refusing to write such policies.

Reuben and Proctor, an 80-member law firm in Chicago, lost its insurance coverage in 1985. The reason: increased legal malpractice suits.

These are not isolated cases. In February of 1986 the U.S. Chamber of Commerce reported that 20 percent of its membership had not been able to renew its liability insurance. Over 40 percent recently have faced increases of 100 to 500 percent.

About the Author

James Gattuso is an attorney who received his law degree from U.C.L.A. in 1983. His bachelor of arts degree in political science was earned at the University of Southern California in 1979. Mr. Gattuso practiced law in Washington, D.C. with the firm of Squire, Sanders and Dempsey from 1983 to 1985 before joining the influential conservative organization, the Heritage Foundation, where he is a policy analyst.

Frequently featured in the Heritage Foundation's national publication, *Backgrounder,* he has also published articles in a variety of journals and newspapers, including *Society* magazine, the *Houston Post,* the *St. Louis Post-Dispatch,* and the *Wall Street Journal.*

His essay here is based on a paper published by the Heritage Foundation with the research assistance of John Buttarazzi.

This situation has now stabilized: for the most part insurance rates have been level for about the last six months and some cancelled policies have been reinstated. However, rates generally have not decreased; consumers are still paying several times as much for insurance as they did a year ago and are, hence, still bearing the high cost of a badly flawed liability system.

To an extent, the timing of this liability crunch stems from the general fall in interest rates over the last few years. While interest rates were high, insurers were able to use investment income to cushion the mounting costs of the tort system. In the last few years they have been hurt by investment losses and the burden has been shifted to the consumers in the form of higher premiums.

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Nevertheless, the root cause of the problem is the liability system itself. The upheaval in this system in recent decades is reflected in the changes that have occurred in both the number of lawsuits and size of awards. The number of tort claims filed has increased substantially over the last decade. Most striking is the number of product liability cases filed in federal district courts, jumping from 1,579 in 1974 to 13,554 in 1985, a 758 percent increase. Claims in state courts also have been increasing. Example: in 1975, New York civil courts handled 12,842 liability cases; by 1984, this number had reached 19,613.

A similar trend affects medical malpractice cases, where claims filed against physician-owned companies increased from 10,568 in 1979 to 23,545 in 1983. One major insurance company, with 14.6 percent of the national medical market, reported 5,870 claims in 1983—up 2,757 from 1979. Further, the frequency of claims reported nationwide has increased from 3.3 claims per 100 doctors in 1979 to 5.4 in 1983.

The amounts of court awards have been soaring, even after adjusting for inflation, for the last two decades. While national totals for awards are not available, the Rand Corporation's Institute for Civil Justice recently examined court awards in San Francisco, California, and Cook County, which includes Chicago, Illinois. It found that the average award in San Francisco almost tripled over the past 25 years, rising from $49,000 in the early 1960s to $130,000 per award in the late 1970s (in constant 1979 dollars). Similarly, awards in Cook County doubled during the period studied.

Interestingly, the median award in both jurisdictions

(the level at which there is an equal number of larger and smaller awards) stayed almost the same in both jurisdictions during the period. So the increase in average awards was caused almost entirely by the increase in the size of the largest awards. This is illustrated dramatically by the number of awards of $1 million or more. In the early 1960s, only 0.3 percent of all San Francisco awards, less than one in 300, was for $1 million or more (in 1979 dollars). By the late 1970s, 2.3 percent, or about one in 43, reached that mark. These trends, unlike the cost and availability of insurance, are not temporary; they continue to impede the due process of law by flooding our court system.

These million dollar awards have an enormous impact on the legal system. During the 1960s, the relatively rare million dollar verdicts accounted for only 8 percent of all the money awarded. By the late 1970s, they accounted for 48 percent of all the money awarded. Thus, although the very large award is still fairly rare, it accounts for a tremendous portion of the funds distributed through the legal system.

Punitive damage awards, intended to penalize the defendant for egregious conduct, rather than compensate the plaintiff for injury, similarly have increased. The Rand Corporation found that, while Cook County and San Francisco averaged one and three punitive damage awards per year respectively in the early 1960s, they now average nine and eighteen per year. More striking, even after discounting for inflation, the average punitive award increased from $54,000 to $395,000 in San Francisco, and from $4,000 to $489,000 in Cook County—an increase of over 12,000 percent.

Certain defendants pay more in damages than others. Defendants perceived by the jury as having substantial assets, what lawyers call "deep pockets," are generally assessed much more in damages than others. Corporations in Cook County, for instance, generally pay 30 percent more than individuals in cases involving modest injuries. In cases of serious injury, the gap is enormous: corporations pay over four times as much as individuals. Taxpayers suffer too, since local governments also are considered to have "deep pockets."

It is clear that the tort system—designed to provide for the compensation of those wrongfully injured by others—has gone seriously awry. Liability rules have been stretched to the point where fault is almost a secondary issue. The system now has more of the hallmark of a lottery to enrich plaintiffs and their lawyers, rather than of a means to right wrongs.

In considering reform, however, policy makers should not look simply for ways to make it more difficult for legitimate plaintiffs to win, or artifically limit the amounts they can receive, for the problems in the tort system stem from its failure to differentiate between meritorious and unmeritorious claims and to allocate costs fairly. Reform should address these problems rather than simply the plight of defendants as a group. Thus policy makers should resist the temptation to put an absolute limit on the amount in damages that a plaintiff can receive. A person who has been wronged should not be denied full recovery simply because the amount of his damages is high. Similarly, recovery should not be denied simply because the plaintiff was insured for the loss. The assets of the plaintiff, as are those of the defendant, are irrelevant to the degree of damage.

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Further, reformers should not limit the use of the contingent fee system for attorney's fees. Under the contingent fee system, plaintiff's attorney's fees are set as a percentage of the eventual award in the case. No money is paid before the award is made, and if the plaintiff does not win, the attorney is not paid at all. Through this simple voluntary arrangement, the legal system provides legal representation to every person with a reasonable claim, regardless of wealth. Prohibition or limitation of such fee arrangements would, of course, reduce the number of lawsuits in the courts, but would not improve the legal system.

There are several reforms, however, that could improve the system. The most important of these is simply to change the substantive rules of liability to strengthen the roles of fault and responsibility. While the specific changes required vary according to the particular area of law involved, policy makers should:

1. Give more weight to manufacturer's warnings to plaintiffs.

Many of the more questionable recent product liability cases concern the extent of a manufacturer's duty to warn of danger. One case, for instance, involved a man injured when his car battery exploded after he lit a match to check the fluid level. Although the battery was embossed with large letters warning of "EXPLOSIVE GASES" and urging users to keep sparks, flame, and cigarettes away, a federal court held that a jury still could hold the manufacturer liable for failing to warn adequately of the danger.

Manufacturers who do not warn adequately of a product's danger should be held responsible. However, the standard is too often applied inconsistently and stretched unreasonably to find defendants liable. It should be applied more fairly.

2. Restore abuse, alteration, and misuse of a product as sound defenses in product liability cases.

Absurd results have been reached in states where such defenses are not recognized. For example, in one recent case, a 41-year-old bodybuilder entered a footrace with a refrigerator strapped to his back. During the race, one of the straps came loose, he was injured, and he later sued the refrigerator manufacturer and strap maker. The jury awarded the man $1 million, although neither the refrigerator nor the straps were intended to be used in such a way. Tort law should not hold manufacturers liable for injuries caused by such misuse of their products.

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3. Define "foreseeable" injury in a more rational manner.

While tort law has never imposed liability on defendants when the injury resulting from their action was unforeseeable, the foreseeability test is sometimes bizarrely applied.

In one 1983 California case, the companies responsible for the design, location, installation, and maintenance of a telephone booth were sued when an intoxicated driver drove off the street, across a parking lot, and into the phone booth, injuring the person in it. The California Supreme Court ruled that a jury could find the accident was foreseeable, and hold the defendants responsible, because they failed to protect the booth from such an occurrence.

Statutes can be drafted by legislators to achieve these reforms. Since the most serious problems involve the application of law to particular cases, however, change also must be pursued by judges in state and federal courts. Effective reform cannot be achieved as long as judges continue to consider the tort system a mandatory insurance system, in which the actions and responsibilities of the parties are secondary. Such a change in judicial attitudes may take time, but it is necessary.

There are also a number of changes legislators should make regarding the calculation and apportionment of damages and the distribution of the burden of attorney's fees:

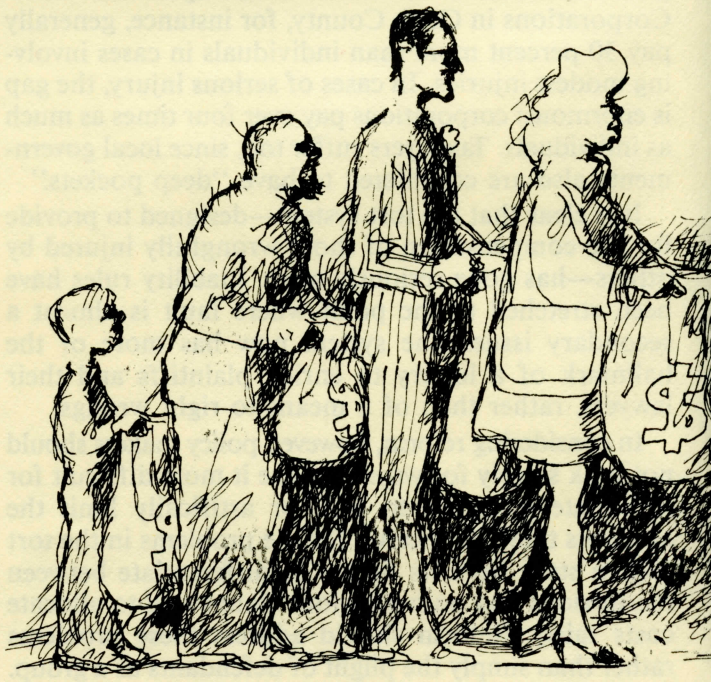
4. Limit "noneconomic" damages.

Noneconomic damages are intangible injuries on which no accurate dollar value can be placed, such as pain and suffering or loss of a loved one. Certainly, the justice system should provide compensation for such injuries, as they are as real as injuries that can be measured in conventional ways. However, there are very few standards as to how much to award for injuries of this kind and the courts are allowed almost complete discretion in determining the level of such awards. They are often influenced, moreover, by factors other than the proper amount of compensation for a particular injury. A major influencing factor indeed seems to be deep pockets—the amount the defendant is able to pay.

Standards for awards in these cases are urgently needed. These standards could take several forms. A dollar limit, of perhaps $250,000, could be placed on noneconomic damages. Several states, including Florida and Maryland, enacted such limits last year. Or they could be limited to some multiple of the measurable damages. Such limitations, of course, should not apply to measurable injuries.

5. Pay punitive damages to the court.

Punitive damages are damages assessed against a defendant, above the amount of actual harm caused to a plaintiff, to punish and deter the defendant from committing the wrong again. The legal standards for punitive damages have stayed fairly constant over the years. In most jurisdictions, such damages are to be applied only in cases of "willful, wanton, or malicious" conduct. Yet punitive damages are being applied with increasing frequency, reflecting changes in jury attitudes, rather than an increase in willful conduct.



There are several ways to address this problem. Punitive damages could be capped. This, however, would make it difficult to assess adequate punishment for truly egregious conduct. Better, they could be limited to a certain percentage of the defendant's assets or income, although there is a chance that this might prevent sufficient deterrence in some cases.

The best solution may be to have punitive damages paid to the court or some other disinterested body. Although punitive damages are not meant to compensate the plaintiff for injuries suffered, many juries now assess large punitive damage awards in an effort to aid defendants who seem particularly needy, regardless of whether the facts call for punishment. Were these funds paid to a third party, the jury's decision would more likely be based on the only relevant factor: the conduct of the defendant.

6. Modify "joint and several liability" rules.

Many problems in the tort system stem from the way in which damages are apportioned among defendants. Under the doctrine of "joint and several liability," defendants in many jurisdictions can find themselves liable for huge amounts of damages, despite minimal negligence on their part.

The concept of joint and several liability means simply that in cases where two or more defendants are found liable for an injury, each is responsible for the entire amount of damages, rather than just their proportionate share. The plaintiff, of course, can recover only once—but can choose from which defendant to collect. The theory underpinning this is that, if the negligence of a defendant causes an accident, his liability is not reduced just because others were also negligent.

In practice, however, applying the joint and several liability doctrine can lead to very unfair results. Example: In San Diego, a man was injured while in a friend's car. The driver was found to be 90 percent at fault because he had been drinking and smoking marijuana and was speeding at the time of the accident. The

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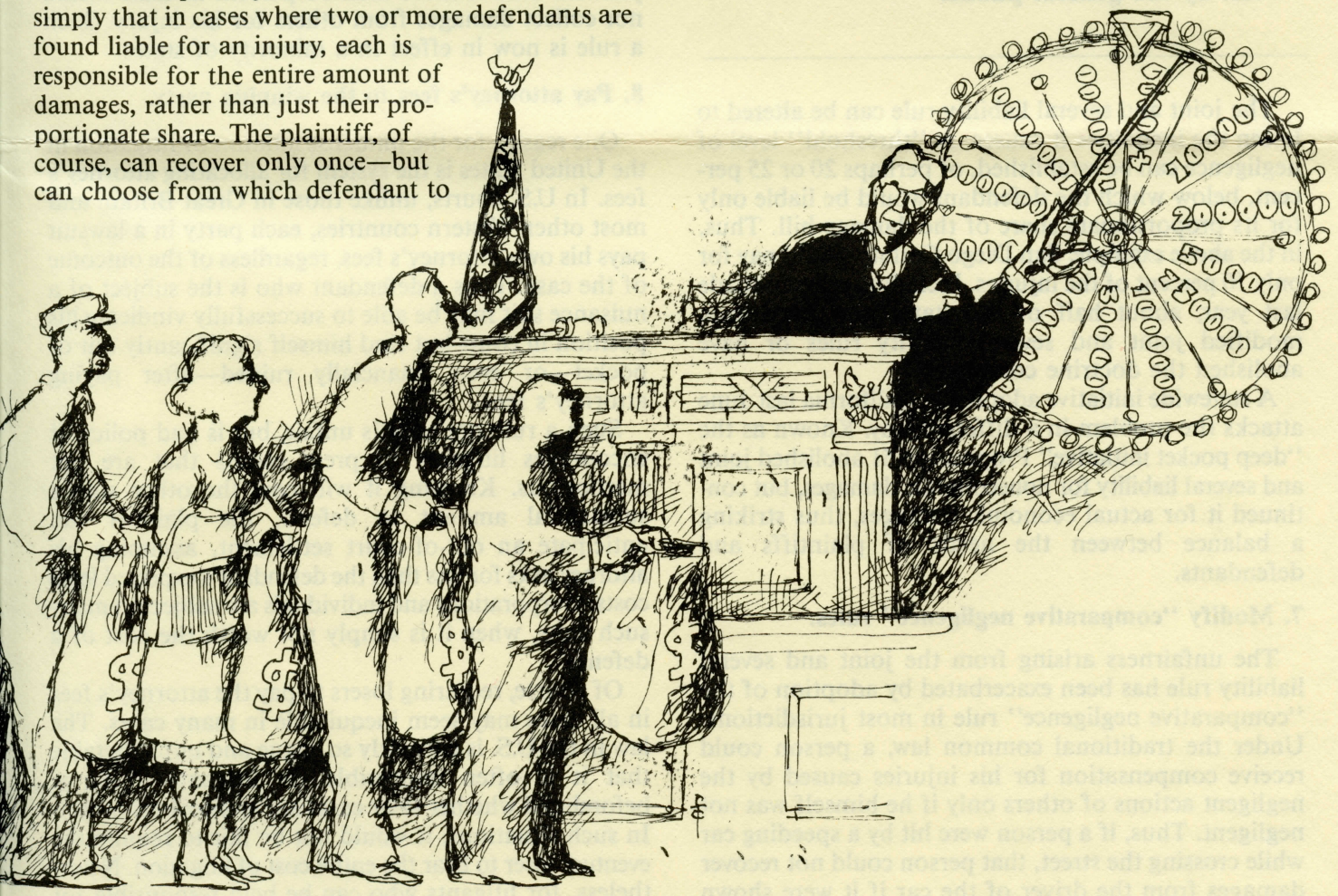

County of San Diego was found 10 percent at fault for failing to install curve markers on the road. But since the driver had no insurance, the County ended up paying the entire $2.5 million in damages.

The joint and several liablity rule has been particularly important in cases involving deep pocket defendants. In many of these cases, the party primarily to blame for an injury has limited wealth, making it impossible to collect a large judgment against him. So the plaintiff brings suit against others, who may be only peripherally connected to the injury, but who have the money to pay a huge judgment. But now losers include states, counties, local school boards, hospitals, and other organizations viewed as wealthy or having access to wealth.

"For years, the consequences of these changes were hidden. The biggest losers were, for the most part, those who could be expected to enjoy little public sympathy: big corporations, insurance companies, rich doctors. Now the impact of changes in the tort system is felt by the general public."

The joint and several liability rule can be altered to lessen the inequities it causes. A "threshold" level of negligence can be established, of perhaps 20 or 25 percent, below which the defendant would be liable only for its proportionate share of the damage bill. Thus, in the above example, San Diego County would pay for only 10 percent of the injuries. Including reforms made last year, about half of the states now have such modified joint and several liability rules or have abolished the doctrine completely.

A statewide initiative adopted in California last June attacks the problem in a different way. Known as the "deep pocket initiative," Proposition 51 abolished joint and several liability for noneconomic damages, but continued it for actual economic damages, thus striking a balance between the needs of plaintiffs and defendants.

7. Modify "comparative negligence" rules.

The unfairness arising from the joint and several liability rule has been exacerbated by adoption of the "comparative negligence" rule in most jurisdictions. Under the traditional common law, a person could receive compensation for his injuries caused by the negligent actions of others only if he himself was not negligent. Thus, if a person were hit by a speeding car while crossing the street, that person could not recover damages from the driver of the car if it were shown that he was not paying sufficient attention to the traffic.

In many cases, "contributory negligence" caused unjust results—many plaintiffs were denied all compensation when there was only minimal negligence on their own part. Reacting to these inequities, the courts of many states have adopted a new standard, known as "comparative negligence." Under this rule, the damages to which a plaintiff is entitled are reduced in proportion to his degree of negligence. Thus, if a plaintiff is found 50 percent at fault for his own injuries, he can still be compensated, but his recovery is reduced by 50 percent.

Comparative negligence, however, has created as many problems as it has solved, since plaintiffs primarily responsible for their own injuries can recover compensation from others. For example, if comparative negligence principles had been applied in the example cited above, the County of San Diego would have been liable not only for the injuries of the car's passenger, but also for 10 percent of the injuries to the intoxicated and speeding driver.

The problem with the comparative negligence standard could be reduced by the adoption of a new rule under which a plaintiff is not to collect from a defendant less at fault than the plaintiff himself. Thus a plaintiff who is more than 50 percent at fault would not collect damages from others for his injury. Such a rule is now in effect in a minority of states.

8. Pay attorney's fees to the winning party.

One reason for the immense amount of litigation in the United States is the system for allocating attorney's fees. In U.S. courts, unlike those in Great Britain and most other Western countries, each party in a lawsuit pays his own attorney's fees, regardless of the outcome of the case. Thus a defendant who is the subject of a nuisance suit may be able to successfully vindicate his position in court but find himself significantly out of pocket—or even financially ruined—after paying attorney's fees.

Such a rule not only is unfair, but is bad policy. It encourages litigants to press claims that are not meritorious. Knowing it will cost the other side a substantial amount to defend, the plaintiff can anticipate an out-of-court settlement, assuming his attorney asks for less than the defendant's expected legal costs. Corporations and individuals are subject to many such suits, when it is simply not worth the cost of a defense.

Of course, requiring losers to pay the attorney's fees in all cases may seem inequitable in many cases. The law in the U.S. is currently so vague and unpredictable that it is often impossible for litigants to know beforehand whether their cases are meritorious or not. In such situations, it would not be fair to require the eventual loser to bear the entire cost of litigation. Nevertheless, for litigants who can be held responsible for

bringing a clearly unmeritorious case, courts should be allowed to routinely assess attorney's fees against the plaintiff.

There are many ways to do this. A modified English rule could be adopted under which attorney's fees would be assessed against the losing party if the judge specifically found that the plaintiff's claim was not reasonable. While most states now allow attorney's fees to be awarded in some cases, usually the case must have been brought in "bad faith," a higher standard. Conversely, the fees could automatically be assessed unless the court specifically found that the claim was reasonable, as is now the rule in Alaska. Such a rule would provide the necessary disincentives to unreasonable claims, while protecting those who unsuccessfully, but reasonably, pursued their claims.

There are, of course, many other reforms that policy makers should consider. Among these are separating the liability and damage phases of trials in order to reduce prejudice to defendants, requiring damage awards for future injuries to be paid in installments, rather than a lump sum, and increasing court fees to eliminate the taxpayer subsidy of private disputes. Further, reforms to reduce the cost of litigation, possibly through increased use of alternative dispute resolution systems, should be explored.

For the most part, the necessary reforms must be executed at the state level, since tort actions are generally under state law. Congress, nonetheless, has an important role to play. In the field of product liability, for instance, an individual state may have little incentive to reform its laws when the manufacturers who are hurt by it are located out-of-state. Thus, to protect interstate commerce, a field standard may be necessary.

The problems in the U.S. tort system are deep and far-reaching. They will not vanish overnight. They are not the result of any single law or any particular court decision—they are, rather, the consequence of decades in which legal changes slowly eroded traditional defenses, decreased the importance of individual responsibility, and made the system more vague and unpredictable. The result is that the U.S. tort system is less a process of compensation for wrongs and more a huge national lottery.

For years, the consequences of these changes were hidden. The biggest losers were, for the most part, those who could be expected to enjoy little public sympathy: big corporations, insurance companies, rich doctors.

"The very existence of whole industries and countless jobs (if not more) are at risk."

Now the impact of changes in the tort system is felt by the general public. As the risks of liability grow larger and more unpredictable, insurance becomes harder to obtain. Beneficial products then are withdrawn from the market, obstetricians stop delivering babies, child care centers close, and taxes rise to cover municipal liability claims.

The solution is not simply to make it more difficult to win compensation through the tort system. Persons who have been wronged must be able to receive adequate compensation through civil justice. Instead, the system must be reformed to allow it to determine exactly who has been wronged, to determine the appropriate level of compensation, and to prevent abuse by those without meritorious claims. There is no quick fix. Rehabilitation of the tort system will take a long time.

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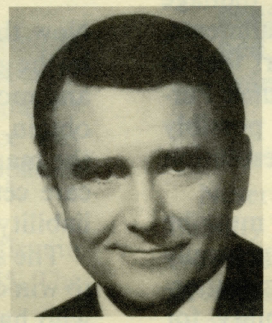
ROSTRUM

Good intentions aren't enough

George Roche on the threat of government control

It's tough being an innovator. Social pioneers are always being put on the spot. Even when injustice and social need clearly exist, the good intentions of people trying to address them will be called into question.

One can recall the protestations of civil-rights advocates, for example, that their intention was to eliminate the very real discrimination suffered by blacks and other minorities. In no way did they intend to saddle the country with quotas or reverse discrimination. Likewise, those who advocated reform of abortion laws wanted only to save poor girls from the dangers of coat-hanger abortions and the foul dens of the back-street butchers. It was not intended as birth control.



What has happened in both areas is due to the Law of Unintended Consequences—which somehow derives the most outrageous results from the most nobly motivated efforts.

Now another well-intended measure looms: The Civil-Rights Restoration Act, a bill designed to "correct the defects" in enforcement of Title IX of the Education Amendments of 1972 that arose from the Supreme Court's decision in the famous *Grove City College v. Bell* case of 1984.

This bill, whose chief sponsor and most visible advocate is Senator Teddy Kennedy, contains the most staggering possibilities for extension and abuse of government power—all based entirely on the best of intentions.

Hillsdale College, of which I am president, and Grove City College of Pennsylvania rejected federal demands to provide statistics on student and staff gender and ethnic makeup. Our reasoning was that since these were private schools receiving no direct federal funds, we had no obligation to comply.

The government saw things differently, since some Hillsdale and Grove City students were receiving federal student aid. The situation ended with Grove City's going to the Supreme Court to argue a case compiled largely by Hillsdale. The result was mixed.

On one hand, the Court agreed with the government that federal aid to a student makes the college where the student spends that money an *indirect recipient* of federal funds and therefore liable to comply with federal regulations. On the other hand, the Court said that federal money finding its way into one part of an institution does not necessarily create obligations for the institution as a whole—a win for educational freedom, albeit a small one. It's this part of the Court's finding that the civil-rights restoration act is designed to "correct."

The proposed law would allow government to cut off the flow of dollars entirely to any institution that discriminates—or fails to comply fully with a regulation—in even one program. It would be a powerful weapon in the enforcement of civil rights, and, as such, has an appeal that lawmakers find hard to resist.

But this act is not limited to colleges. Supermarkets where customers pay for groceries with food stamps would be covered. Farms participating in crop-subsidy and price-support programs would be covered. In short, any entity anywhere through which even one federal dollar flows—no matter how indirectly—would be subject to regulation by Uncle Sam.

The danger in all this is not in what *is,* but in what *could be.* Questions have been raised about whether the law would force church-affiliated hospitals to perform abortions—regardless of their stand on abortion.

What can we do? Can we turn for reassurance that we won't face such interpretations of federal law to those who promised us there would be no quotas, no busing, no reverse discrimination? Can we look for such asssurance to a Supreme Court that just reaffirmed the concept of affirmative action? Hardly.

I have seen the product of government innovation firsthand. And I guarantee there's no end to the possibilities that await us if Congress is allowed to eliminate even the last small principle of restraint that Hillsdale and Grove City fought to establish.

George Roche is president of Hillsdale College, a liberal-arts school in Michigan

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