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### Point

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## TORT REFORM

# POINT

by Andrew F. Popper

Prior to 1965, product liability cases were relatively rare. Section 402(a) of the Second Restatement had not yet been adopted, and consumers had low expectations regarding the utility of tort litigation. In part, this was due to an advertising campaign on the part of producers to convince consumers that product related accidents were the fault of consumers. In the famous "Willie Tinker" commercial, a small cartoon figure suggested to consumers that, if only they would be more careful, fewer accidents would occur. Social expectations regarding the legitimacy of corporate decisionmaking were high; a public trust was placed in our corporate system. Because they were good for America, corporations were to be believed. Accordingly, courts were highly protective of corporate interests.

From 1965 forward, the game changed with the state-by-state adoption of §402(a) allowing victims in product-related accidents to use the court system to accomplish consumer protection goals. A small number of large verdict cases involving asbestos and similar high-risk products have generated significant consumer protection benefits. It is no secret that the manufacturing and insurance communities would now like to turn back the clock.

Approximately ten years ago, those seeking fundamental change in the tort system latched on to the phrase "tort reform" to describe legislative and judicial initiatives designed to minimize the potential liability of in-

surers and manufacturers. The selection of the term "tort reform" reflects true genius in terms of public relations. It provides a positive and populist image to a profoundly pro-corporate and anti-consumer initiative.

Of the many millions of consumers injured by products each year, only a tiny number succeed in product liability actions. For the few who seek legal redress, there are numerous hurdles. Nonetheless, reformers have fostered a perception that consumers win an endless number of outrageous cases.

Some years ago on a hot summer night an infant put to bed for the evening in his crib wriggled in his sleep until his feet stuck between two slats of his crib. He twisted and wriggled further, and his abdomen and chest also slid through those two slats. The final wriggle, and his shoulders moved through the same area, but his head was larger than the opening; the next morning his parents found him hanging—dead from his crib.

Turn on your LEXIS machines and check the caselaw, and you will not find this case. A lack of negligence and a finding of "no defect" under 402(a) blocked the plaintiffs from prevailing in this case. A plaintiff-oriented tort system "out of control" would have awarded damages in this setting if sympathy had replaced logic.

Arguments about "tort reform", however, often begin with industry representatives telling, almost tongue-in-cheek, about outrageous, "wacky" cases. Speech after speech begins with the tale of the psychic who won a multi-million dollar verdict after she claimed that a CAT-scan had destroyed her psychic powers or the story about the burglar who fell through a skylight, brought suit, and the building owner was ordered to pay millions of dollars. These anec-

dotes are usually mythical or are about judgments that were reversed. Such stories do not justify passing legislation that reduces the potential for injured persons to seek and receive redress for their injuries.

There is a need for legislation, although it is not based on the misfortunes of the insurance or manufacturing communities in the United States. Instead, it is based on the simple need for health and safety that is threatened by unsafe products, unsafe drugs, unsafe toys, unsafe food, unsafe chemicals, and abusive unregulated insurance companies.

The tort reformers have an agenda. It has been developed carefully over the last ten years. At the outset one might have argued that the reformer's goal was to make the process of personal injury litigation more efficient. Today it is clear that the goal of tort reform is to reduce the potential of injured persons to succeed in personal injury cases, limit the amount of money negligent manufacturers are obligated to pay for the harm their products cause, reduce the risk insurance companies face so that they can compound their already obscene profits, and limit the exposure to punitive damages for manufacturers or others who have engaged in intentional misconduct.

Much the same as the "Willie Tinker" campaign of the 1950s, tort-reform advertising is designed to convince the American public that the agenda for tort reform serves the consumer. The advertising seeks to create an image of a tort system in which unworthy plaintiffs are lucky winners of a bizarre lottery who, on a regular basis, walk away from courthouses with millions in their pockets and smiles on their faces. This unjust enrichment, so goes the advertisement,

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can only be stopped if state legislators, members of Congress, judges, and juries all become convinced of the "fraud" which plaintiffs and their lawyers are perpetrating on the system.

The appropriate response to this purported misallocation of resources is to change basic tort law. Over the last decade, the tort reformers have sought to modify legal doctrine by putting forward legislation in line with the reforms agenda. The proposed legislation and some of its consequences include:

(1) In tort cases where punitive damages are justified because of serious misconduct, only the first plaintiff filing the lawsuit should receive punitive damages. Thus, all others—regardless of the circumstances of their injury—will receive only compensatory damages.

(2) Punitive damages should be capped. Thus, manufacturers who produce defective products can calculate their exposure to punitive losses and breed that exposure into the price of the products they sell.

(3) Joint and several liability should be modified or abolished. Thus, those who engage in intentional or negligent misconduct will have their liability limited, and plaintiffs will have to pursue every potential defendant.

(4) Strict liability should be eliminated for product sellers. Thus, those who profit the most from the sale of a product, retailers, are able to avoid liability when that product malfunctions.

(5) In order to receive punitive damages, a plaintiff should demonstrate conscious and flagrant disregard on the part of a defendant. Thus, a standard that is harsher than "intent" in criminal cases would be imposed on the victim of corporate negligence.

(6) Change negligence law in each state so that to prove manufacturers' liability would require a showing that the harm that occurred could have been "reasonably anticipated" as opposed to "foreseeable." Thus, again, the victim's burden of proof becomes all but provable.

(7) Make "state of the art" an absolute defense in any product liability case.

(8) Any manufacturer who complies with a government standard should have no exposure or limited liability for punitive damages, particularly in the food and drug and airline businesses.

(9) Exclude as a matter of law in every state evidence of subsequent remedial measures.

(10) Never allow a plaintiff to collect punitive damages, but instead have such damages pour over into a "state purpose" trust.

(11) Compel plaintiffs to engage in arbitration prior to the initiation of any personal injury case, and create the risk of a heavy penalty for plaintiffs who opt out of an arbitration system.

(12) Expand and enrich the learned intermediary defense, relieving doctors of the obligation to inform patients of the risks of pharmaceutical products or treatments.

It does not take too much scrutiny to realize that those legislative proposals do not reflect the agenda of a group inclined to protect the consumer.

How does this agenda play out in Maryland? To say that Maryland has done nothing stunning regarding its tort system is not to insult state legislators or the judges who have created the system, but rather to suggest that the state has proceeded carefully and not undergone significant changes by virtue of the tort reform movement, save one.

In 1986 Maryland passed a "cap" law. The Courts and Judicial Proceedings article, section 11-108, and 11-109, places a \$350,000 limit on noneconomic damages, or pain and suffering, for all causes of action that arise after July 1, 1986. The limitation does not apply to economic or punitive damages. Jurors are not advised of this limitation, and jury awards that exceed this sum must be reduced to conform with the limit. The Maryland Court of Special Appeals affirmed the constitutionality of this limitation on recovery in *Edmonds v. Murphy*, 83 Md. App. 133, 573 A.2d 853, cert. granted, 321 Md. 46, 580 A.2d 1066 (1990). Although it is certainly consistent with the basic theme of the tort reform agenda, the inapplicability of the limitation to punitive or compensatory damages makes this a rather moderate tort reform action.

Several other parts of Maryland law are in line with some of the tenets of the tort reform agenda. Maryland law, section 80-913 of the Courts and Judicial Proceedings article, does not allow the topic of the wealth of the defendant to get to a jury until a finding of liability has been made in a punitive damage case. This, however, seems to be the best way to deal with the ques-

tion of the wealth of the defendant. *Exxon v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986), holds that the defendants may not be held jointly and severally liable for punitive damages, lessening the opportunity of plaintiffs to collect punitive damages should one of several joint tortfeasors be judgment-proof.

In *Montgomery County v. Valk*, 317 Md. 185, 562 A.2d 1246 (1989), the court reiterates that the doctrine of contributory negligence was alive and well in Maryland, but it also concluded that contributory negligence would not bar a case brought under section 402(a).

On the other hand, Maryland does utilize a consumer-oriented approach regarding the date of discovery of injury rule for the statute of limitation. Maryland was one of the first states to expand the use of the discovery rule to almost all types of personal liability cases.

More recent legislative activity in the state of Maryland regarding the tort field has been something short of phenomenal. Although a number of bills have been introduced, few have passed, and none—except the "cap"—have had a significant impact on the tort system. Nothing has been proposed in Maryland on the order of magnitude of the federal bills.

Last fall the United States Senate considered S.1400, a bill resubmitted for the Spring 1991 Session as S.540. It provides benefits for defendants and would change basic jurisprudential principles in every state, creating "federal tort law" in areas reserved historically to the states.

The current proposed federal product liability bill is rather moderate. It would modify joint and several liability, enhance the government standards defenses, and mandate the use of clear and convincing evidence as a standard for punitive damages. Although these are modest proposals, legislation that preempts state tort law and establishes a federal tort system is not to be taken lightly. Should the Congress pass this bill, you will see in future quiet sessions of various congressional committees, attracting nowhere near the amount of attention given to the first product liability bill, the federalization of tort law and the disassembly of consumer protection that flows from the existence of the tort system. The simple fact is that there is no justification for a federal tort law.

We do not have a national crisis needing federal attention. Indeed, a recent American Bar Foundation study concludes that, based on an evaluation of 25,000 jury verdicts, there is no punitive damage crisis. (Daniels & Martin, *Myth and Reality In Punitive Damages*, ABF Working Paper 8911, Am. Bar Found. 63 (1990).) Two GAO reports conclude that there is no explosion in the product liability litigation field, and certainly no explosion relating to compensatory damages. An identical conclusion is reached by Professors Henderson and Eisenberg in "The Quiet Revolution in Product Liability: An Empirical Study of Legal Change," 37 U.C.L.A. L. Rev. 479, 480 (1990).

Yet, reformers agree that the current system radically impairs the competitive posture of domestic businesses in international markets. It is incredible, however, to assert that a system that condemns defective products or products and services produced in a negligent or grossly negligent manner is destructive of our competitive posture. There is no market for defective goods.

A recent OTA study on competitiveness evaluated four factors needed to

improve the posture of American businesses in international markets. Notably, modification of product liability law, the law pertaining to punitive damages or other components of the proposed federal bills, was not within that recommendation. Although it may be tempting to pin these problems on product liability law, the evidence is simply not there.

A companion invalid justification for reform, including federal reform, involves the diversion of assets away from research and development. The argument goes like this: so much money is spent on tort cases that there is nothing left for research. There is, however, only a miniscule level of real dollar loss from compensatory or punitive damages. Moreover, the vast majority of punitive damage awards do not involve consumer goods; rather, they involve personal violence, false arrest, malicious behavior, or intentional misconduct.

The final justification for this destruction of federal/state relations involves the desire to establish a uniform tort system. First, and more fundamental, the very nature of the United States suggests that uniform state law is not and should not be a

dominant federal objective. Second, each of the federal bills establishes diverse standards for liability and ultimately discriminates between defendants in product liability cases and defendants in other cases. The bills are written in such a way that they require state courts to do extensive interpretation, giving lawyers and law professors much to work on, but hardly creating uniformity.

In short, a federally imposed system of tort reform will not work and is not needed. Indeed, it appears that the Supreme Court has lost interest in the tort reform agenda, rejecting tort reformers' arguments in *Pacific Mutual Life Insurance v. Haslip*, Docket No. 89-1279, argued October 8, 1990, decided March 4, 1991, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, \_\_\_ U.S. \_\_\_ (1989), 109 S. Ct. 2909 (1989), and *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988). Congress should do the same. Moreover, Maryland should maintain its "go slow" approach to tort reform. Maryland legislators should be wary of tort reformers in sheep's clothing: the true agenda for tort reform is nothing that will benefit the citizens of this state. ■

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