Tort Reform—Toward Moderation

Phillip A. Cole

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation
Available at: http://open.mitchellhamline.edu/wmlr/vol13/iss2/4
INTRODUCTION

[T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.¹

The conduct of litigation within the tort system in late 20th century America evinces little spirit of moderation. The tort claim stands beside apple pie as an American institution. Persons involved in auto accidents are known to seek legal advice before seeing their doctor. Lawyers arrive on the scene of major disasters within hours of their occurrence. When an airliner crashes, the class action suit is on file before the wreckage

is cleared. Virtually every enterprise except, notably, that of
the judiciary itself, is affected by the spectre of expensive litig-
ation and exposure to ruinous liability for misjudgment or mis-
adventure—real or rhetorical. We are a litigious society, and
tort reform is the platform of the reactionaries. They have
struck a responsive chord.

This Article will discuss the basis for dissatisfaction with the
tort system, the problems identified, the reforms proposed us-
ing Minnesota as an example, and the author’s proposal to cre-
ate two tiers of civil litigation.

I. THE ORIGINS OF DISSATISFACTION

Many states have passed some legislation designed to mod-
erate tort exposure; Minnesota is among them. The political
impetus for this reform is easy to underestimate. The Minne-
sota House of Representatives in 1986 passed its tort reform
measure unanimously! Its bill was considerably broader than
the ultimate enactment—calling for a cap on pain and suffering
and the abolition of joint liability. On the national scene, Min-
nnesota is not perceived to have had a particularly bad experi-
ence with abusive verdicts. California, on the other hand, is
perceived as the birthplace of every zany theory of liability ad-
vanced in the past twenty years. This perception is perhaps
only slightly exaggerated, but the California voters declared
their verdict recently. In a 1986 referendum, over two-thirds
of the voters turning out threw out the venerable doctrine of
joint liability among joint tortfeasors. It seems incredible in-
deed that the doctrine of joint liability should stand beside tax-
ation and public education as popular political issues in
California. Thus, tort doctrine, once the exclusive domain of
Professor Prosser and his legions of students now inhabiting
the bench and bar, has come to the fore of American domestic
politics.

The intensity of the current tort reform advocacy is the
product of a fortuitous confluence of events. For the past sev-
eral years, increasing publicity has attended tort litigation.
From the story of the man who sued because he suffered a
heart attack while starting his lawnmower to the spectre of
American lawyers flocking to India to sign up clients in the
Bhopal disaster, the average American has garnered reason
enough to question the social and moral values underlying the
tort system as it now functions. This perception was ignited by the huge increases in liability insurance premiums experienced in the last two years, an event rooted more in the return to a stable currency than in the tort verdict experience. Nonetheless, the tort process was seen not only as silly and degrading but was costing everyone a lot of money in premiums and in the cost of products and services. After all, if a Manhattan obstetrician pays an annual premium of $85,000 to insure against professional liability, the doctor has to recoup that cost in his charges to patients. Criticism of the tort system has been wide-ranging, but the theme is relatively constant. The legal profession—bench and bar—operates a franchise for the transfer of wealth attended by huge transaction costs and little predictability either in respect of liability or damages. The results are a product of chance more than principle. This theme has an element of truth to it.

Although lip service is paid to the doctrine of *stare decisis*, the rules are sufficiently vague and the purview of the jury in determining outcome is so broad that the results cannot often be rationalized on principle. The complexity of the issues entrusted to juries in contemporary litigation perhaps marks the most profound alteration in the tort system within the past twenty-five years. The jury's role in resolving fact issues is paramount in civil litigation. A jury is certainly well equipped to resolve the question of whether a witness lied or a defendant exceeded the speed limit. In recent years, however, the evolution in torts has created "fact" issues of a different sort. Juries now resolve questions of whether a machine's design is free of defect, whether a surgeon's technique is reasonable, and numerous issues similarly beyond the ken of a cross-section of ordinary citizens. Modern tort litigation is, then, clearly dependent upon expert witnesses. There is usually no dearth of willing experts on a given issue. The results in these cases are rarely instructive. The manufacturer's duty to warn of foreseeable hazards in the use of its products exemplifies this problem.

Almost all product liability claims include an allegation that the manufacturer failed to properly warn or instruct the user concerning the safe operation or use of the device. Hardly any product sold in the last fifteen years has not been plastered with repetitious and often obvious declarations of hazard. Nonetheless, the adequacy of the precise content of the warn-
ing is a jury question in most cases. Thus, in *Parks v. Allis-Chalmers Corp.*, the court upheld a jury verdict finding a warning inadequate on a forage harvester. The plaintiff farmer had lost his arm while attempting to unclog the forager without shutting off the power. Warnings were in place that warned against this practice as dangerous and unsafe and instructed the operator to turn the power off before reaching in to unclog. The jury found the warning inadequate, and the court affirmed that finding as proper because the warning had not stated specifically that the machine could entrap the limb before the operator could react to extract it. It is apparent that if the generic warnings of the manufacturer are assessed in light of each specific accident, the warning can be found wanting in light of the elements of the accident under inspection. The fact is that the jury can react in whatever way it chooses in these cases and will probably be affirmed. In *Parks*, for example, it is clear that if the jury had approved the warning, it would have been affirmed. A manufacturer is justifiably frustrated in defending these cases. No manner of prudent warning will save the machine manufacturer from litigation and a certain percentage of unsuccessful verdicts. This dilemma has, in some cases, notably the punch press, driven companies out of business.

The *ad hoc* aspect of the tort exposure probably produces its greatest abuse in the stimulation of numerous marginal claims. The essence of the plaintiff attorney's prospective analysis is whether the claim can be sufficiently enhanced by argument or expert testimony to avoid a directed verdict and be submitted to a jury. If so, the case is suitable for filing. In this respect, much tort litigation is perceived as high stakes and sophisticated gambling.

Defenders of the current process, most notably the plaintiff lawyer groups, argue that the system is an essential instrument of social justice, citing most frequently the products liability arena as the most visible example. While it cannot be denied that trials have, on occasion, identified corporate wrongdoing or immorality, these are certainly exceptional cases. The ques-

2. 289 N.W.2d 456 (Minn. 1979).
3. *Id.* at 457.
4. *Id.* at 458.
5. *Id.* at 459.
tion remains whether the entire apparatus must be preserved without alteration because of its occasional vindications.

II. The Problem Areas

The problem areas in the tort system upon which the reform proposals focus, as taken from the Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, are:

- the movement towards no-fault liability, which increasingly results in companies and individuals being found liable even in the absence of any wrongdoing on their part;
- the undermining of causation through a variety of questionable practices and doctrines which shift liability to "deep pocket" defendants even though they did not cause the underlying injury or had only a limited or tangential involvement;
- the explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as pain and suffering or punitive damages; and,
- the excessive transaction costs of the tort system, in which virtually two-thirds of every dollar paid out through the system is lost to attorneys' fees and litigation expenses.⁶

The principle that one who wrongfully injures another should compensate the injured party for his loss has virtually unanimous acceptance in American society not only as a principle of law but as an instinct of justice. The tort system exists primarily to adjudicate these controversies and determine compensation. In recent time, the notion of liability has been separated from the principle of fault. In its place, the courts have made social and economic policy judgments focused on just means of spreading the risk of injuries independent of fault. Strict liability in products manufacture and distribution is a prime example. Market share liability is another. The cost of such a system managed through the courts is probably too high. The compensation of these victims may not be an issue for judicial management.

The awards of damages for personal injury in some areas has

---

certainly increased. Jury Verdict Research, Inc. reports that average malpractice jury verdicts increased from $220,018 in 1975 to $1,017,716 in 1985, and the average product liability verdict increased from $393,580 in 1975 to $1,850,452 in 1985. This upward trend is undoubtedly evident in other areas such as accountant and lawyer professional liability. There is no data, however, to suggest a disproportionate increase in verdicts attached to auto accidents or the other garden variety torts. The implication that there may be a two-tiered verdict system was confirmed in the preliminary observations of a Rand Corporation study finding that jurors in Cook County, Chicago, tended to award three times as much to an injured worker than to an automobile accident victim with similar injuries.

The awarding of damages in a personal injury case is left virtually to the discretion of the jury, bound only by a vague directive categorizing the permissible elements of the ultimate award, i.e., pain, suffering, emotional distress, loss of earning capacity, etc. The jury is traditionally given no guidelines in fixing the amount of the award. Two claimants with virtually identical injuries can and often will receive widely disparate awards. This unpredictability is perhaps a greater vice than the occasional clearly excessive award.

Transaction costs are certainly high. A tremendous amount of litigation takes place in relation to the claims actually paid. The litigation process is inherently expensive. In a tort system more reliant on advocacy skills than any other ingredient for resolution, it is inevitable that great expense will attend the resolution of disputes. The large sums of money at stake also dictate the commitment of substantial resources to the controversies. Claimants pay their lawyers contingent fees of one-third to one-half of the award for their services. Thus, it is obvious that, in a hard fought dispute, the injured claimant will receive far less than one-half of the funds committed to the controversy by the time it is resolved. It is also true that, in the great number of cases where the claimant fails to recover, the

---

defendant has incurred great expense and has no remedy for reimbursement.

It is difficult to describe the transaction costs in gross as excessive. These costs are exactly what is demanded by the tort process. If these costs are to be reduced, the number of cases must be reduced. Reducing transaction costs is dependent upon reform in the substantive law serving to eliminate categories of claims, e.g., no-fault laws, workers compensation, or upon revisions in civil procedure that discourage the prosecution of dubious claims or eliminate the intensity of pre-trial discovery.

III. The Efficacy of Reforms - The Minnesota Example

The 1986 Minnesota legislature enacted a host of measures under the label “tort reform.” Some of these provisions accomplished needed changes in the process. None of the changes were passed with expectation of insurance premium reductions. The tone of the reforms, however, declares that the bench and bar must dignify the system by reducing the litigation of dubious claims.

The discretion of the court to sanction lawyers for the assertion of frivolous claims and defenses was increased.\(^9\) Lawyers filing medical malpractice claims must certify that they have expert witness support for the claims.\(^{10}\) Lawyers may not include a claim for punitive damages unless the court approves the claim on a motion to amend.\(^{11}\) The latter measure was passed to counter a growing trend to allege punitive damages routinely as a means of broadening the scope of discovery. It is evident from these measures that the legislature concluded that lawyers, and to some extent courts, were not adequately policing the quality of claims being asserted. The legislature demands greater scrutiny of the claim by the lawyer and the judge at the outset. The success of these measures ultimately depends upon the response of the trial bench. If it is perceived that nothing more than the forms of civil pleading have been changed, the reforms will fail. If the courts require, however, that cases be commenced with at least *prima facie* evidence in support, the institution of meritless litigation should be re-

\(^9\) Minn. Stat. § 549.21 (1986).
\(^{10}\) Minn. Stat. § 145.682 (1986).
\(^{11}\) Minn. Stat. § 549.191 (1986).
duced. The early summary judgment should no longer be viewed as a tool to be used sparingly.\textsuperscript{12}

Minnesota enacted a unique measure fixing the discount rate annually for future damage computations including pain and suffering.\textsuperscript{13} This measure requires the court to use the same discount rate, ignoring inflation, in calculating future damages in all personal injury cases.\textsuperscript{14} The aim of the law is to introduce greater certainty into the calculation of future damages and to obviate the need for economist experts on interest rates and inflation. The measure is definitely addressed to the issue of high, unpredictable damage awards and transaction costs.

Minnesota also abolished the collateral source rule on damages incurred to the date of trial.\textsuperscript{15}

A measure to abolish joint liability failed in Minnesota. Some adjustment in this rule is called for in light of the adoption of comparative negligence. Joint liability among tortfeasors is a traditional rule in Minnesota. Its rationale was stronger, however, under a contributory negligence system where the recovering plaintiff was innocent of fault. In requiring one of several tortfeasors to discharge the entire liability in preference to depriving an innocent party of full compensation, the courts were striking a reasonable balance. If the plaintiff was negligent at all, he would bear the whole loss. Under comparative fault, however, a negligent plaintiff can recover. Joint liability should not be enforceable in any case where the plaintiff bears a measure of fault. In such cases, all parties should be liable for their individual share alone.

Minnesota’s reforms are aimed at discouraging the filing of marginal claims. As a priority, courts are expected to demonstrate a willingness to dismiss cases in advance of discovery unless some evidence is produced to support the claim. If these measures fail, the next round of “reforms” may start to divest the courts of their discretion. The elements of tort liability and damage awards will become less dependent on the rulings of judges and more on the prescriptions of statutes. Other states, notably Florida and California, have already begun the process.

\textsuperscript{13} Minn. Stat. § 604.07 (1986).
\textsuperscript{14} Id. at subd. 3.
\textsuperscript{15} Minn. Stat. § 548.36 (1986).
of divesting the courts of their prime rulemaking role in tort cases.

IV. A Proposal - The Minor and Major Case Differential

The American court system is unique in its accessibility to the citizen. For a nominal fee, litigation costing the state and the parties tens of thousands of dollars can be initiated with virtually no risk to the initiating party to pay either his own or his opponent's extraordinary costs. The contingent fee system has enhanced this accessibility by making skilled legal representation available at no risk and little cost. The plaintiff's lawyer assumes the risk and spreads it among a large base of clients by charging a high contingent rate. Thus, an active plaintiff's lawyer can afford to pursue several unsuccessful claims for every actual recovery. This accessibility has great benefits, but it also produces abuse and an abundance of avoidable litigation. Outside of the contingent fee system, the expense of litigation discourages many marginal claims. A similar deterrent should be introduced into contingent fee litigation, at least where significant damage claims are presented.

Tort cases may arbitrarily be divided into minor and major cases. The litigant may perceive a claim as major and force an active and expensive discovery effort and trial unwarranted by the actual stakes. Personal injury claims frequently represent an exaggerated litigation effort in relation to the ultimate outcome. The unpredictability of result induces both sides to promote seemingly minor cases into major litigation efforts. There should be some risk attached to this promotion. In securities fraud cases or commercial litigation, the damage opportunity or exposure is patently simpler to assess. Damages in these cases, or at least their relative magnitude, can be well understood by arithmetic calculation. The jury does not have great latitude in measuring the loss. In the personal injury contest, however, the jury has enormous discretion. One jury may award $10,000 for an injury that might draw $100,000 from another panel. This uncertainty often leads the parties to an extensive litigation effort that, in hindsight, might seem unwarranted. A system that increases the risk as well as the reward for promoting expensive litigation could serve to induce a more realistic appraisal of the case at its outset.
The distinction between minor and major cases in the civil justice arena should be formalized in the rules of procedure. In "minor cases" the litigants would be significantly restricted in the conduct of discovery and in the time allotted for trial. Statutory costs and disbursements should be taxable as currently allowed—filing fees, expert fees, and witness fees. These are nominal costs in relation to the cost of the litigation effort itself. Damages would be restricted to $100,000 or less. The plaintiff would make the initial election to proceed as a "minor case." The emphasis would be upon minimal discovery and rapid resolution with comparatively low cost handling.

In a "major case," however, the parties would proceed in the manner currently practiced in the District Courts—virtually unrestricted discovery, pre-trial conferences, and lengthy trials. There would be no limit on damages. In major cases, however, the losing party would have to indemnify the winner for up to $30,000 in attorneys' fees plus actual costs. The party seeking major case designation would be required to post bond for the costs and fees. The cost of the bond would be a taxable cost. Success in the litigation would be defined in such a manner as to permit the parties to use the offer of judgment process to reduce their exposure.

A claimant who seeks to root around in the business files of his adversary for days, depose countless employees, and otherwise require the commitment of substantial time and resources to the dispute would be forced, at least in part, to indemnify his opponent if it is all for naught. After all, the tort system itself is built upon principles of compensation and individual responsibility entirely consistent with the notion that one who requires another to spend thousands of dollars defending an unproven claim (or prosecuting a meritorious claim), should reimburse the opponent. The right to sue, hallowed as it is in the American culture, is not degraded by such a modest attachment of responsibility. Possibly, such a process would significantly contribute to a reduction in transaction costs, a result that would achieve meaningful reform and not at the expense of the rightful claimant.

**CONCLUSION**

A tort system for the adjustment of wrongs and the vindication of rights in private controversies is essential to a free dem-
ocratic society. The preservation of such a system requires that we maintain vigilance against its use as a vehicle for nitpicking grievances or a political instrument for the transfer of wealth. It was intended to be neither.