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Robert L. Habush

THE INSURANCE "CRISIS": REALITY OR MYTH? A PLAINTIFFS' LAWYER'S PERSPECTIVE

ROBERT L. HABUSH*

INTRODUCTION

As a trial lawyer—a *plaintiffs'* trial lawyer—one works on behalf of clients who have been injured or harmed by the negligence or wrongful actions of others. Most of these clients are injury "victims" who are crippled or debilitated, frequently poor or middle class, unable to afford legal representation, and unable to unlock other doors to justice. For these people, and for their concerned families and loved ones, the plaintiffs' lawyer provides a remedy—by obtaining financial compensation for economic losses and pain and suffering, and by securing, on a more philosophical or idealistic level, some measure of *justice*. When the plaintiffs' attorney is successful in proving to the jury, judge or appropriate societal institution that a given defendant is liable and therefore obligated to compensate the plaintiff accordingly, the client is recompensed. Similarly, the attorney, who is frequently rendering legal services on a contingent fee basis, is also remunerated after a determination of the defendant's liability.[1] When the plaintiffs' attorney is not successful, the injured party is left to their own resources, and the attorney receives nothing.[2] This is the nature of the role of the plaintiffs' attorney in our civil justice system.

Although this system has served society for two hundred years, it is under fierce attack today by the wealthy and powerful insurance industry and related special interests.[3] These special interest groups have launched an assault on the civil justice system, in this author's opinion, to reap higher profits and to further enrich their already crammed treasuries. They are not, as they contend, motivated by altruism or necessity. On the contrary, there is a great discrepancy between reality and the insurance industry's *perception* of reality.

Unfortunately, it is the insurance industry's perception of reality that has recently prevailed in state legislatures across the country.[4] The purpose of this paper is to expose some of the inaccuracies and fallacies

* B.B.A., University of Wisconsin, 1959; J.D., Wisconsin Law School, 1961. Mr. Habush is Immediate Past President of the Association of Trial Lawyers of America. This article was adapted from a speech presented at the National Conference of the American Bar Association in New York City, N.Y. on August 9, 1986.

1. For a thorough discussion of the contingent fee, see Schmidt, *Contingent Fee: Key to the Courthouse*, 92 CASE & COM. 2 (1987).

2. *Id.*

3. *See generally, The Truth Behind the Insurance Panic*, 72 A.B.A. J. 36 (1986) (discussing several proposals to overhaul the tort system and various aspects of tort reform relative to medical malpractice, legal malpractice, municipal liability and product liability).

4. *See infra* note 26 and accompanying text.

propagated by the insurance lobby, and to demonstrate how the tort system, although imperfect, operates as an efficient and indispensable tool, of enormous significance to our American system and values.

I. COMMON MISPERCEPTIONS REGARDING THE CIVIL JUSTICE SYSTEM

Several of my colleagues, members of that loyal opposition which comprise the defense bar, are not reserved in their critical commentary on American tort law.[5] Such commentators claim that the current tort system is not the proper way to deliver benefits to injured people. And they have not wavered from this position for the last two decades. Although such discordant views are certainly worthy of respect and study, they are not necessarily worthy of acceptance.

One of the techniques employed by critics of our tort system has been to rely upon anecdotal references or headline-grabbing "buzzwords" in order to emphatically disparage our present system. Indeed, rhetoric has been a common tactic among some critics. However, those who have gone so far as to attach the label "lottery" to the civil justice system's delivery of compensatory benefits[6] have grossly misconstrued the factors that cause people to make use of the tort system. This term "lottery" connotes that people become involved in personal injury litigation in order to win a *prize*. People who have suffered spinal cord injuries, brain damage, disfigurement, or other serious injuries do not consider their unfortunate situation as an opportunity to win a prize. These victims seek *redress*. They simply employ the tort system to address the devastating effects such injuries have had upon their lives. Contrary to the "lottery" notion, the overwhelming majority of tort vic-

5. Two of the most well-known and prolific defense-oriented commentators are Jeffery O'Connell and Victor E. Schwartz.

Mr. O'Connell is the John Allen Love Professor of Law at the University of Virginia. *See, e.g.* O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L. REV. 17(1986); O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Post-accident Settlement Offers*, 73 CALIF. L. REV. 898, 903-04 (1985) (case study of an insurance contract that provides no-fault coverage for catastrophically injured high school athletes); O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267 (1984); O'Connell, *Offers That Can't Be Refused*, 77 NW. U. L. REV. 589 (1982) (discussing restrictions on personal injury claims).

Mr. Schwartz is a noted author, lecturer and product liability defense lawyer. He is also coauthor of W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS (7th ed. 1982). For a better understanding of the views of Mr. Schwartz, see *Uniform Product Liability Law: Hearing on S. 2631 Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 8-13 (1982) (statement of Victor E. Schwartz, Counsel to the Product Liability Alliance). Mr. Schwartz argues that product liability laws are unfair to plaintiffs because legitimate claims may be barred by "the snafu of product liability laws" and, also, unfair to defendants who are held liable in situations where the product is misused. He concludes by advocating federal uniform standards for product liability law. *Id.* at 10.

6. *See, e.g.*, J. O'CONNELL, THE LAWSUIT LOTTERY—ONLY THE LAWYERS WIN (1979). *See also* Andresky, *A World Without Insurance?*, FORBES, July 15, 1985, at 40 (citing statistics which reflect a profound increase in filings of civil suits, the authors state: "Americans now seem to look on a civil suit against a corporation or municipality as a kind of lottery—a lottery to be played whenever they can."). For Mr. Schwartz's current views on this subject see Schwartz and Mahshigian, *A Permanent Solution For Product Liability Crises: Uniform Federal Tort Law Standards*, infra pp. 685-702.

tims would trade almost any amount of money for the restoration of their health and the dignity of a normal existence.

A. *Adjudicative Efficiency: Facts About the Civil Justice System*

Although spokespersons for the insurance industry and the defense bar are oftentimes critical of the civil justice system's level of efficiency, recent studies by Professor Marc Galanter,[7] of the University of Wisconsin Law School, and surveys included in a new book on the American jury[8] prove beyond doubt that the United States tort system is efficient. Consider the facts. Ninety-eight percent of all property/casualty claims are settled without trial.[9] Only four of ten thousand claims are tried to conclusion,[10] and only one of every ten thousand reaches the appellate level.[11] Furthermore, the occasional excessive jury award is subject to the scrutiny of the trial judge and the appellate courts. And this scrutiny does serve to reduce exorbitant awards. In fact, detailed analyses show that the larger the original verdict, the larger the percentage reduction and the lesser the net award.[12] Final judgments, arrived at after some post-judgment reduction (whether by agreement of the parties or by order of the court), are significantly less than original verdicts and appear to award the most worthy victims the greatest amounts.[13] Post-trial settlements also serve to reduce the unevenness of verdict amounts by decreasing, more than proportionately, some of the unusually high original awards.[14] With very few exceptions this process corrects the unusual, the bizarre, or the unfair verdict. In these aspects the tort system *is* working.

Critics also complain about the quantity of litigation supposedly overburdening our judiciary and drastically increasing the cost of doing business.[15] However, new studies have emerged that thoroughly dis-

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7. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61-71 (1983) (arguing that the view of Americans as being unusually litigious is based more on myth than careful analysis of the data).

8. J. GUINTHER, THE JURY IN AMERICA, (1987).

9. *See* Bailey, *Managing Litigation*, BEST'S REVIEW, Feb. 1985, at 62, col. 2.

10. *Id.*

11. *Id.*

12. ASSOCIATION OF TRIAL LAWYERS OF AMERICA, ANALYSIS OF MILLION DOLLAR VERDICTS at i-ii (1986) [hereinafter MILLION DOLLAR VERDICTS]. Of 198 cases returning plaintiffs' verdicts which totalled $790.6 million, the actual amount paid out—after remittitur or other post-judgment reduction or settlement— was $339.9 million. This amount represents forty-three percent of the original verdict amounts. Additionally, these post-judgment reductions decreased by four percent for every additional $1.0 million of the original verdict amount.

13. *Id.* at ii. For example, 22 paralysis victims received an average verdict of $4.1 million and an average settlement of $3.7 million; 37 brain damaged plaintiffs averaged $3.7 million and $2.3 million, and nine amputation cases averaged $3.5 million and $2.0 million respectively. *Id.*

14. *Id.* at iii.

15. One of the most prominent critics has been former Chief Justice Warren E. Burger:

> In 1953 there were 279 authorized federal judgeships; today there are 647....In 1953 district court filings were about 99,000; there were about 3,200 courts of

credit the notion that our court system is crumbling under a "litigation explosion."[16] These studies are in accord that the filing of cases in the United States has not increased to an extent that could be even remotely described as an "explosion." For example, data drawn from twenty states, comprising twenty-nine limited and general jurisdiction, statewide court systems, revealed a moderate fourteen percent increase in filings for tort, contract and real property claims between 1978 and 1981, but a four percent *decrease* for such claims between 1981 and 1984.[17] Clearly the critics are confused about any "explosion."

B. *Sources of Misperceptions: Media, Lawyers and the Insurance Industry*

Despite credible evidence of an efficient tort system, the public perception of personal injury cases is distorted, exaggerated and untrue.[18] In part, this is probably because most Americans have little exposure to actual personal injury cases or personal injury lawyers. Instead, they rely on what they see, read, or hear in the media for information about such cases and lawyers. What they get from the media is an incomplete and distorted picture.[19] Additionally, the public reads only about the *filing* of multimillion-dollar lawsuits, and assumes that such suits are the norm. Unfortunately these casual observers do not follow the same cases to final disposition; the public is rarely informed (by the same me-

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appeals filings. Currently there are nearly 240,000 district court filings and 28,000 courts of appeals filings....

Address of Chief Justice Warren E. Burger discussing the state of the judiciary. Presented to the midyear meeting of the American Bar Association in New Orleans, Louisiana on February 6, 1983 (*reprinted in* Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, at 443 (1983)).

16. *See* NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984 173, at 176-77 (1986) [hereinafter STATE COURT CASELOAD STATISTICS]; *see also* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (1986). As to the cost of doing business, *see* DANIELS, PUNITIVE DAMAGES: STORM ON THE HORIZON? (American Bar Foundation, Seminar 11, Feb. 8, 1986) (demonstrating that punitive damages are not routinely assessed in cases where the plaintiff wins money); *The Manufactured Crisis*, CONSUMER REPORTS, Aug. 1986, at 544. Although filings of product liability cases in federal courts have increased, damage claims linked to asbestosis victims account for thirty-one percent of such cases. (Of 13,554 product liability cases, 4,239 involved asbestosis claims.) This increase is not startling because the consequences of long-term exposure to asbestos take years to become apparent. *Id.* at 546.

17. STATE COURT CASELOAD STATISTICS, *supra* note 16, 173 (1986).

18. *Have Anecdotes, Not Facts, Fueled the Insurance Crisis?*, Nat'l L. J., Feb. 24, 1986, at 15 (reporting the results of a study conducted for the American Bar Foundation by Stephen Daniels, Professor of Sociology at Northwestern University, which revealed that although punitive damage awards greater than $1.0 million have generated tremendous publicity, the median award for punitive damages throughout the country is actually less than $50,000).

19. *See* Forbes, *Fact and Comment*, FORBES, Jan. 27, 1986, at 17 (commentary relying on three examples of excessive judgments as justification for tort reform legislation). *See also, Sky High Damage Suits*, U.S. NEWS AND WORLD REPORT, Jan. 27, 1986, at 35-39, 42, 43. In a cover story citing increased filings of product liability cases, criticism is directed toward such litigation and the corresponding bankruptcies of asbestos and IUD (intrauterine device) manufacturers. Although the article details the financial hardship incurred by these large corporations, no mention is made of the *human* victims of these products. The tone of the article is thusly demonstrated: "Anyone from Uncle Sam to Uncle Harry is open to suit, now that the mood of society is to seek a culprit for all of life's mishaps." *Id.* at 36.

dia) as to the actual amount of the final *results*. This incomplete reporting and observation contributes to the misperception that excessive personal injury awards are proliferating in our society.

In addition to the media, plaintiffs' lawyers have also contributed in no small measure to this misperception in the last decade. First, lawyers, not unlike others, like to brag about their significant victories. Some rush immediately to the newspapers and television stations to trumpet successes. Others report exceptional or outstanding results to such information-gathering organizations as Jury Verdict Research, Inc. ("JVR").[20] Again, not unlike others, lawyers are loath to report their dismissals, humiliating lost cases, or merely modest triumphs. Consequently, JVR only receives notice of the largest awards and the most sensational judgments, without further determining how much money was actually paid. As a result, JVR averages are flawed, distorted and exaggerated, and are misused by the insurance industry to influence premiums, jurors and state legislators.[21]

A second way that lawyers have fueled the misperceptions surrounding the civil justice system has been through the use of the *ad damnum* clause.[22] Because the amount or demand set forth in this clause often bears no relationship to the true value of a particular case, the misperception that large suits are proliferating has been aggravated.

Finally, incidents occurring after the Bhopal disaster[23] and the tragic Dallas/Fort Worth air crash[24] cause the public to stereotype all plaintiffs' attorneys as avaricious vultures who rush to the scene of a disaster seeking clients. This impression is inaccurate and unfortunate.

In light of the misperceptions created by the media and by some attorneys, the insurance industry has found it convenient to blame the civil justice system generally, and to indict plaintiffs' lawyers specifically, for the rising cost and shrinking availability of insurance in the "*Great Insurance Crisis of 1986.*"[25] This tactic has been very successful; the alleged "crisis" provided impetus for the tort reform movement of 1986-87, which resulted in thirty-nine states passing some type of reform

20. JVR is a legal publishing company which collects verdict information, analyzes personal injury litigation, and performs personal injury case evaluations for subscribers.

21. Of 472 verified cases involving judgments of $1.0 million or more obtained by JVR and the Association of Trial Lawyers of America, 110 were unusable because there was no response from the attorney of record, the verdicts were confidential, or for a variety of other reasons. MILLION DOLLAR VERDICTS, *supra* note 12 at i, 2.

22. The *ad damnum* clause informs an adversary of the maximum amount of the claim asserted without constituting proof of injury or of liability. BLACK'S LAW DICTIONARY 35 (5th ed. 1979).

23. On December 3, 1984, more than 2,000 people died and tens of thousands were injured as a result of a deadly gas leak from the Union Carbide plant in Bhopal, India.

24. On August 2, 1985, windshear slammed a Delta L-1011 jet to the ground short of the runway at Dallas-Fort Worth International Airport, killing 137. Washington Post, Aug. 4, 1985, at A1.

25. *Sorry, Your Insurance Has Been Cancelled*, TIME, Mar. 24, 1986, at 16-20, 23-26; *Liability Insurance Skyrockets*, Washington Post, Aug. 4, 1985, at K1, K7-8. These articles cite the huge increases in insurance premiums experienced by, to name a few, day care centers, physicians and athletic equipment manufacturers.

legislation.[26]

II. FALLACIES OF THE "INSURANCE CRISIS"

A. *Failed Investments by the Insurance Industry*

For the several-year period prior to the "crisis," the property/casualty insurance companies had been underpricing their commercial line policies in order to raise funds that could be invested so as to take advantage of escalating interest rates.[27] This ability to offset underwriting losses with portfolio investment income and income from other sources has long been a significant factor in how insurance companies determine what they will charge for the insurance they offer. And previously, insurance companies had been able to supplement any premium shortfall with such investment income. In the mid-1980's however, when interest rates unexpectedly fell, investment income did not meet expectations; the companies panicked and attempted to even things out in a single year. Accordingly, insurance premiums were raised several-hundred percent,[28] and policies were cancelled in areas which underwriters perceived as being too risky.[29] Then, in response to protests from their insureds, the insurance industry launched a multi-million dollar advertising campaign to convince the American public that excessive litigiousness and exorbitant jury awards[30] were to blame for the premium increases and the unavailability of insurance coverage. As a result, hundreds of enterprises, including day care centers, manufacturing concerns, governmental units and asbestos-removal companies, were left without insurance.[31] In reality, premiums increased and

26. Priest, *Tort Reform Legislation . . . Is Only a Start*, Wall St. J., Feb. 3, 1987, at 26, col. 5.

27. A property/casualty insurance company basically derives its income from underwriting gains (the excess of premiums over claims and expenses) and investment gains. Because of income from investment gains, a company can have net income even though its premium revenues might not cover claims and expenses. Accordingly, for the past several years property/casualty insurers charged relatively low premium prices, thereby generating increased business and a larger short-term, net cash flow. These monies were then invested and the profit from investment income was used to satisfy any deficiency in premium income. In 1983, for instance, the industry's claims and expenses exceeded premiums, resulting in a loss of about $11.0 billion, but because of its pricing strategy and investment income, the industry had a net gain of about $8.0 billion. *See Hearings Before the Subcomm. on Oversight of the Ways and Means Comm.*, 99th Cong., 2nd Sess. 108, 111 (1986) (testimony of William J. Anderson, Director, General Government Division, U.S. General Accounting Office). For a discussion of risk in the property/casualty insurance business, see J. HUNTER & J. WILSON, INVESTMENT INCOME AND PROFITABILITY IN PROPERTY/CASUALTY RATEMAKING Chapter 5 (1983).

28. *Premiums Soaring as Insurance Crisis Begins to Hit Home*, Philadelphia Inquirer, July 20, 1985, at B1.

29. Sugawara, *Day Care Insurance Imperiled*, Washington Post, July 19, 1985, at C7, col. 1 (insurance for day care centers has become prohibitively expensive or unavailable).

30. In five different advertisements the Insurance Information Institute urged readers to write for a free booklet on reforming the civil justice system. This course of action was described as necessary to control increasing premiums and cancellation of policies. INSURANCE INFORMATION INSTITUTE, THE LAWSUIT CRISIS (Apr. 1986).

31. *See The Manufactured Crisis*, CONSUMER REPORTS, Aug. 1986, at 544 (reporting that the "crisis" was caused by the insurance companies' poor management and investment practices, not by the civil justice system. Additionally, the article points out that analyzing

coverage became unavailable because the industry was reeling from mismanaged investments and retreating interest rates.

B. *The Special Problems of Medical Malpractice*

One significant area that has not escaped the effects of the insurance company panic is the health care industry. Doctors and other health care providers have been drastically affected by extraordinary increases in malpractice premiums.[32] The medical-malpractice problem is further aggravated by the way in which insurance premiums for the medical profession are determined. Unlike other categories of insureds, there is no experience rating among *individual* physicians.[33] Instead, groups or "pools" of health care providers are *collectively* rated. As a result, the best obstetrician in town pays the same rate for insurance as the worst. This system penalizes competent physicians.

Additional problems are caused by the relatively small numbers of doctors making up any particular underwriting risk pool. In Wisconsin, for example, only forty-nine neurosurgeons comprise one underwriting pool; three hundred obstetricians makeup another.[34] Obviously, a single claim—against only one errant doctor could adversely affect the premiums of every doctor in the pool. As a result of this system, good doctors are forced to pay higher premiums because a colleague, over whom they have no control, has made a serious error. Moreover, there has been a woeful lack of discipline prescribed for incompetent doctors.[35] Studies in several states consistently show that one percent or less of practicing physicians are responsible for twenty-five to thirty percent of all losses paid.[36] And yet, many of these doctors continue to

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average awards is misleading because a few disproportionately large awards throw off any average. Instead, it is the *median* award "that shows how the typical injured person is compensated." *Id.* at 546).

As an interesting historical note, during the insurance crisis of the mid-1970's, as insurance companies lobbied for tort reform, several commentators blamed the crisis on the insurance companies' need for high premiums due to poor investments. *See generally* D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE § 20.07, n.56 (Supp. 1979); Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 INS. L.J. 90, 96 (1976); Oster, *Medical Malpractice Insurance*, 45 INS. COUNS. J. 228, 231 (1978); Koskoff, *Physician Insure Thyself*, TRIAL, Dec. 1979, at 4.

32. *See, e.g.*, Nelson, *Medical Malpractice and the Transformation in Health Care Delivery*, 17 CUMB. L. REV. 313 (1987) (providing a comprehensive analysis of the effects of rising premiums and shrinking availability of insurance upon the health care industry).

33. *See* A. HOFFLANDER & B. NYE, MEDICAL MALPRACTICE INSURANCE IN PENNSYLVANIA 72 (1985).

34. INSURANCE SERVICES OFFICE, FUND POPULATION BY ISO CODE AND PREMIUM CLASS (1986).

35. *See* Brinkley, *Should Doctors Be Given a More Thorough Examination?*, N. Y. Times, Nov. 10, 1985, at E10, col.1. (After citing cases involving physician malpractice, this article analyzes the limited extent to which governmental review of physician incompetence is disclosed to the public.); *see also* Supreme Court of the State of New York, County of New York, Grand Jury Report, *Report Concerning the Care and Treatment of a Patient and the Supervision of Interns and Junior Residents at a Hospital in New York County*, Dec. 31, 1986 (Supervision has been lacking and New York is responding by taking measures to increase the supervision of student doctors caring for patients).

36. *Medicine on Trial: The Malpractice Crisis, Case Study Finds When and Why*, Orlando Sentinel, Apr. 13, 1986, at A1, col. 1.

practice.

C. *The Insurance Industry is Strong and Profitable*

The true financial status of the insurance industry in no way resembles the pathetic picture described by industry spokespersons. The industry has mislead the American consumer and media—in an orchestrated fashion—by inflating the amounts actually paid on claims, while at the same time underrepresenting the true profitability of the industry as a whole. For example, congressional reports show median awards to be, generally, only one-fifth the amount claimed by the insurance companies in their propaganda to justify insurance rate increases and policy cancellations.[37] Further analysis indicates that these companies are undeserving of any sympathy or special consideration. To support this contention, one need only examine their financial condition. The insurance industry reported record profits for 1986. Operating profits were reported at $4.5 billion.[38] Combined with their realized capital gains and federal tax credits, the industry's net income was a record $11.5 billion in 1986, which represented an increase of 605% over the 1985 figure of $1.9 billion.[39] "Available industry estimates show that over the next 5 years, the industry expects substantial net gains. . . . [C]alculations, made from industry estimates, indicate an expected net gain before taxes of more than $90 billion over the years 1986 to 1990."[40] In addition to the favorable treatment afforded the insurance industry under the tax laws, it is important to remember that the industry is also immune from federal antitrust regulation.[41] These sobering and impressive facts make it absolutely clear that the insurance industry is thriving. It certainly does not require, nor is it deserving of, the additional assistance which it seeks through enactment of legislative tort reform, at the expense of the legal rights of injured victims.[42]

37. *Report on the Liability Insurance Crisis: Hearings Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 2nd Sess. 171 (Aug. 6, 1986) (testimony of Philip J. Hermann, Chairman of the Board, Jury Verdict Research, Inc.).

38. *Casualty Firms Report Profit*, Washington Post, Jan. 6, 1987, at C2. Operating profit is investment income minus underwriting losses and other expenses. Underwriting losses include not only money paid in actual claims but those amounts set aside for anticipated claims. The latter sums are tax free and interest earning.

39. *Id.*

40. *See Hearings Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 2nd Sess. 56 (1986) (testimony of William J. Anderson, Director, General Government Division, U.S. General Accounting Office).

41. *Solutions to the Liability Insurance Crisis*, 138 CONG. REC. H1595 (daily ed. Mar. 25, 1986) (statement of Rep. LaFalce) (In addition to criticizing the inflated statistics employed by the Insurance Services Office in raising premiums, LaFalce, in posing solutions to the insurance crisis, has suggested that the antitrust exemption enjoyed by the insurance industry under the McCarran-Ferguson Act be repealed or amended.)

42. Hunter & Angoff, *Tort Reform Legislation . . . Ought to Reduce Premiums*, Wall St. J., Feb. 3, 1987, at 26, col. 3 (additional support for the contention that insurance companies need no additional legislative protections; in fact, these companies are now claiming that tort reform will have a negligible effect on premium rates. For example, the St. Paul Fire and Marine Insurance Company, while concluding that tort reforms "will produce little or no savings to the tort system as it pertains to medical malpractice," was simultaneously

III. THE EFFECTIVENESS OF THE AMERICAN TORT SYSTEM

The misperceptions and fallacies alluded to above are threatening the essence of the American civil justice system. Coalitions have sprung up all over the country,[43] condemning the system and advocating radical change. A lynch-mob psychology has set in—one that seeks to emasculate our tort compensation system, to eliminate our cherished seventh amendment right to a jury trial,[44] and to significantly reduce the substantive rights of injured American citizens.

Many of these tort reform coalitions include people who really know, or should know, the true value of our civil justice system, not only as an effective way to compensate injured people, but also as a mechanism to goad faceless corporations into shouldering social responsibilities that outweigh an absolute yearning for profit.

The tremendous societal benefit provided by the tort system, in its present form, should not be underemphasized. Personal injury lawsuits—not tough government regulations or self-discipline by conscience-stricken corporations—forced the redesign of certain dangerous products or their removal from the marketplace. Some of these lawsuits revealed industrial conspiracies or exposed corporate coverups in addition to compensating the victims of such wrongful conduct. The fifty-year conspiracy to coverup the hazards of asbestos was uncovered by a handful of plaintiffs' lawyers who brought this evidence to light on behalf of their injured clients.[45] A contraceptive device, marketed as the "Dalkon Shield," was known to be unsafe but was manufactured and sold anyway, until lawsuits forced it off the market.[46] The continued manufacture and installation of the poorly designed Ford Pinto gas tank was another example of a calculated corporate strategy exposed by plaintiffs' lawyers doing their job in our civil justice system.[47] Other examples include the redesign of the Drano can,[48] the effort to keep

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threatening to withdraw from the West Virginia medical-malpractice market. The reason for this threat was the legislature's failure to pass legislation significantly limiting damages for pain and suffering or restricting joint and several liability. *Id.*)

43. *See* American Tort Reform Association, *A Civil Justice System Out of Balance*, Press Release (Jan. 16, 1986).

44. U.S. CONST. amend. VII provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

45. P. BRODEUR, OUTRAGEOUS MISCONDUCT — THE ASBESTOS INDUSTRY ON TRIAL (1985) (asbestos-related diseases were known forty years before the Manville Corporation claimed that the adverse health consequences of such exposure was known, and much earlier in Europe. *Id.* at 10-14).

46. M. MINTZ, AT ANY COST — CORPORATE GREED, WOMEN, AND THE DALKON SHIELD (1985) (a detailed analysis of the A. H. Robins Company, manufacturers and marketers of the Dalkon Shield).

47. Pinto gas tanks, when struck from the rear, had a high failure rate resulting in frequent violent explosions. *See* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 777, 174 Cal. Rptr. 348, 361 (1981) (Ford management based its decision to go forward with the production of the Pinto, knowing that the gas tank design was unsafe, on the profit which would result from omitting or delaying the necessary "fixes").

48. *See, e.g.*, Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969).

flammable children's pajamas from the marketplace,[49] and the redesign of gas tank caps on tractors.[50] The tort system and plaintiffs' lawyers are largely responsible for these accomplishments; lives have no doubt been saved, and injuries lessened.

CONCLUSION

Critics of the civil justice system, even if they acknowledge that some social benefits are derived from the system, still complain about the cost of delivering justice. They also complain that the process is ponderous and time-consuming. Whatever its faults and costs, our system of justice, not unlike our democratic form of government, is immeasurably better than any known alternative. The right to a court hearing is as treasured as the right to vote, the right to bear arms and the right to freedom of religion. People in the Soviet Union do not concern themselves with the cost of compensation systems. Victims of the Chernobyl nuclear accident do not even consider obtaining compensation from juries of their peers. And yet, some in this country advocate reducing the rights of our citizens.

Is the tort system perfect? No. Can it stand some fine tuning? Yes. Should there be some alternatives to courts for some categories of cases? Absolutely. And what about the lawyers? Plaintiffs' lawyers who prosecute meritless or frivolous lawsuits should be dealt with severely through sanctions by the bar associations.[51] Defense lawyers who present frivolous defenses or unnecessary delays should be treated similarly.[52] And lawyers who charge excessive fees should also be disciplined by the bar associations and the supervising courts in the respective states.[53]

The faults of our tort system and its players, like the supposed economic plight of the insurance companies, are greatly exaggerated. In both instances, there is a problem of myth versus fact. Hopefully, the leaders of the various bar associations in the United States will help the public to distinguish fact from fiction, truth from distortion and myth from reality. This kind of educational process is imperative if we ever hope to lead the American citizenry to a realization that our civil justice system *is* working. In the meantime, while this educational process is evolving, we must guard against the continued erosion of individual legal rights for the sake of protecting the purses of wealthy and influential special interests: the profitable insurance companies, the manufacturers of dangerous products, and the negligent providers of vital services.

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49. *See, e.g.*, GRYC v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980); Weems v. CBS Imports Corp., 46 Or. App. 539, 612 P.2d 323 (1980).

50. *See, e.g.*, San Antonio v. Mendoza, 532 S.W.2d 353 (Tex. Civ. App. 1975).

51. ASSOCIATION OF TRIAL LAWYERS OF AMERICA, THE OFFICIAL POSITION OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA ON FRIVOLOUS COURT ACTIONS, CONTINGENCY FEES, INFLATED DAMAGE CLAIMS, CLIENT SOLICITATION, AND LAWYER ADVERTISING (1986).

52. *Id.*

53. *Id.*