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Benjamin R. Civiletti

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### Recommended Citation

Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 Md. L. Rev. 40 (1986)  
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol46/iss1/5>

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# COMMENTS ON GALANTER

## ZEROING IN ON THE REAL LITIGATION CRISIS: IRRATIONAL JUSTICE, NEEDLESS DELAYS, EXCESSIVE COSTS

BENJAMIN R. CIVILETTI\*

A fundamental goal of our civil justice system should be to assure that legitimate claimants with serious injuries caused by wrongdoing receive fair and just compensation for their injuries in a timely and cost-efficient manner. The real crisis facing the civil justice system cannot be seen as Professor Galanter suggests through the application of statistical paradigms, but instead can be seen in the failure of the system to achieve this fundamental goal. The real crisis can be seen in the irrational justice dispensed by the civil justice system, in the inordinate delays in courts across the country, and in the wasteful costs imposed on those who are caught up in tort litigation. The real crisis can be seen from the fact that injured parties carry the burden of their injury under appalling circumstances for extreme periods of time and at staggering economic and human costs.

Today innocent or near blameless defendants are too frequently put at the mercy of happenstance and the vagaries and passions of the jurors. The aberrations that plague current tort litigation not only disappoint the parties involved, but also impose a tremendous, unpredictable, and unnecessary cost on litigants and nonlitigants alike. The solution to the real litigation crisis lies in fundamental tort reform coupled with measures designed to more effectively and efficiently process the legitimate claims of injured parties.

### I. THE NEED TO RETURN TO FAULT-BASED LIABILITY

Historically, tort law had two purposes. Its first purpose was to provide timely and reasonable compensation to those wrongfully injured by others. Its second purpose was to deter such wrongful con-

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\* Senior Partner, Venable, Baetjer, Howard & Civiletti. B.A., The Johns Hopkins University, 1957; LL.B., University of Maryland, 1961. Attorney General of the United States, 1979-81. The author gratefully acknowledges the assistance of Angela M. Townsend in the preparation of this comment.

duct. Now, sadly, the tort system is serving neither of its original purposes well.

Originally liability under tort law was based on fault. People were only held liable for the injury of others when their conduct affirmatively resulted in injury to others. As Justice Oliver Wendell Holmes explained in his classic work, *The Common Law*, tort law is based on the premise that a person should be given "a fair chance to avoid doing the harm before he is held responsible for it."<sup>1</sup> A number of new doctrines have arisen that now threaten to erode completely the concept of fault.

Strict liability, originally reserved for extraordinarily dangerous circumstances, has been expanded to an almost absurd reach. Many experts feel that this expansion of liability has led, certainly in the products liability area, to an increase in tort litigation. Professor Galanter's analysis indicates that it certainly has led to an increase in products liability filings in federal courts<sup>2</sup> and that such increases have pressed on an already overburdened and malfunctioning system. If the tort system is to function as was intended, liability should be applied as was intended. Fault-based liability should be restored. Strict liability should be limited to its original purpose—extraordinarily dangerous circumstances.

The doctrine of joint and several liability, as applied in recent years in many states, has also led to a distension of liability. Under this doctrine, when two or more defendants have caused injury to a single plaintiff, the entire liability can be imposed on one defendant. Each is liable separately and together for the plaintiff's damages. Too often this concept is abused and the plaintiff will seek redress against only the most solvent defendant—the one said to have the "deepest pocket" rather than the one most at fault. The plaintiff can receive the entire award from the one defendant regardless of

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1. O. W. HOLMES, *THE COMMON LAW* 115 (M. Howe ed. 1963).

2. Professor Galanter's statistics show a 46% increase in tort filings in federal district courts from 1975 to 1984. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 16, Table 2 (1986). Galanter further states that a major part of the increase in tort case filings in federal courts was products liability cases. *Id.* at 21.

Although I would prefer to focus on state court litigation patterns, Professor Galanter chose to emphasize federal court filings and so I must respond in kind. I would note, and Galanter initially concedes, the limited legitimacy of working with federal case-load and disposition patterns. Galanter acknowledges that only 2% of all cases are filed in federal courts. Regardless of that acknowledgement, however, he centers his argument around that group of cases.

Federal litigation represents so small a fraction of American litigation as to lack any representativeness. Even though such data may be more readily available, they do not necessarily present a true picture of the litigation situation in this country.

that defendant's degree of fault or the plaintiff's contributory negligence.

The doctrine of comparative negligence in its current application has also invaded fault-based liability standards. Originally liability was measured under a contributory negligence standard by which a plaintiff negligent in any but a very minor degree could not recover against any defendant. This doctrine was fundamentally unfair and has been replaced with comparative negligence in all but six states.<sup>3</sup> Under pure comparative negligence, plaintiff's damages are reduced proportionally for the plaintiff's own negligence but no degree of negligence bars recovery from a defendant. Thus, for example, a plaintiff eighty percent negligent could recover against parties who were only twenty percent negligent.<sup>4</sup>

Fundamental reforms in joint and several liability and in comparative negligence standards could achieve more appropriate apportioning of liability. Two reforms that are finding increasing acceptance are pure several liability and a modified comparative negligence standard of fault.

Pure several liability guarantees that individuals are held responsible only for their own actions, and not the actions of others.<sup>5</sup> Wealthy defendants no longer act as insurers for the wrongdoing of parties of lesser financial means.

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3. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1.1 (2d ed. 1986).

4. In the simple case, when the defendant has suffered no injuries, the plaintiff recovers 20% of the damages. When both have suffered injuries, a 20% negligent defendant may counterclaim for 80% of the injuries. Even in this situation, it may be economical for an 80% negligent plaintiff, with \$100,000 in damages, to recover \$20,000 from the defendant. If the defendant has suffered only \$10,000 in damages, the defendant would recover \$8,000 from the plaintiff, resulting in a net payment of \$12,000 to a plaintiff who was 80% at fault.

5. Twenty of the twenty-eight states that have adopted modified comparative negligence have used the aggregate defendant comparison. This approach contrasts the plaintiff's negligence with the total of all of the defendants' negligence, rather than with the negligence of each individual defendant. See *Riddell v. Little*, 253 Ark. 686, 488 S.W.2d 34 (1972); *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962); *Mountain Mobile Mix, Inc. v. Gifford*, 660 P.2d 883 (Colo. 1983); *CONN. GEN. STAT. ANN.* § 52-572h (West Supp. 1986); *DEL. CODE ANN.* tit. 10, § 8132 (Supp. 1984); *HAW. REV. STAT.* § 663-31(a) (1976); *IND. CODE ANN.* § 34-4-33-4 (Burns Supp. 1986); *IOWA CODE ANN.* § 668.3(1) (West Supp. 1986); *KAN. STAT. ANN.* § 60-258a(a) (1983); *MASS. GEN. LAWS ANN. ch. 231*, § 85 (West 1985); *NEV. REV. STAT. ANN.* § 41.141(1) (Michie 1986); *Hurley v. Pub. Serv. Co. of N.H.*, 123 N.H. 750, 465 A.2d 1217 (1983); *N.J. STAT. ANN.* § 2A:15-5.1 (West Supp. 1986); *OHIO REV. CODE ANN.* § 2315.19(A)(1) (Anderson 1981); *OKLA. STAT. ANN.* tit. 23, § 13 (West Supp. 1985); *OR. REV. STAT.* § 18.470 (1983); *PA. STAT. ANN.* tit. 42, § 7102 (Purdon 1982 & Supp. 1986); *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903 (Utah 1984); *VT. STAT. ANN.* tit. 12, § 1036 (Supp. 1986); *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979).

Under most modified comparative negligence systems, plaintiffs can only recover when their negligence is less than the aggregate of all the defendants' negligence.<sup>6</sup> This assures that parties who have primarily caused their own injuries cannot seek damages from those less at fault.<sup>7</sup> Under pure several liability incorporating a comparative negligence standard, a defendant can be held liable only for that portion of the judgment attributable to the defendant's own negligence. Joint and several liability will still apply when it can be shown that the defendants actually acted together and in concert to cause the plaintiff's injury.<sup>8</sup> However, the defendant must be allowed to seek contribution from fellow tortfeasors.

Essential to both pure several liability and modified comparative negligence is an assessment of the negligence of nonparties. One cannot properly ascertain a defendant's fault, whether for comparison or determining the extent of liability, if a jury is not allowed to consider the negligence of those not named in the suit. This reform is rapidly gaining acceptance among the state legislatures.<sup>9</sup>

## II. RATIONALIZING DAMAGE AWARDS

Needed guidelines are missing. Currently, our legal system provides judges and juries no rational basis for awarding

6. A comparative negligence system must also consider other factors. No comparison of fault should be made when a plaintiff has been injured as a result of a defendant's intentional tort. Additionally, a comparative negligence system should not upset a state's system of imputed negligence. If a state had imputed one party's negligence to another, it should continue to do so for the purposes of comparing fault. Finally, assumption of the risk should only act as a complete bar to recovery when the plaintiff has expressly assumed the risk. Implied assumption of the risk in other cases should be only one factor among others in assessing degrees of fault. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-2505(A) (Supp. 1985); ARK. STAT. ANN. § 27-1763 (1979); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1986); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1985); N.Y. CIV. PRAC. L. & R. § 1411 (McK. 1976).

7. Joint liability for tortfeasors who act in concert traces back to the early common law when it was considered impossible to divide what was seen as an indivisible wrong. 3 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 10.1 (2d ed. 1986). This joint liability was included, as an exception to strict several liability, in the State of Washington's recent tort reform legislation. *See* An Act Relating to Civil Actions (Senate Bill No. 4630), ch. 305, § 401, 1986 Wash. Legis. Serv. No. 6, p. 47 (West).

8. Pure several liability should in no way upset vicarious liability. For example, an employer would be responsible for its servant's portion of damages as well as its own, but not for any other party's.

9. Provisions for the assessment of the fault of nonparties were included in recent tort reform in *Colorado*: Act of May 16, 1986 (Senate Bill No. 70), ch. 108, 1986 Sess. Laws 680; *Connecticut*: An Act Concerning Tort Reform, Public Act No. 86-338, § 3(d), 1986 Conn. Legis. Serv. No. 5, p. 399 (West); *Washington*: *see supra* note 7; *Wyoming*: WYO. STAT. § 1-1-109(b) (Supp. 1986).

noneconomic damages to injured parties. The amount of awards for pain and suffering, rather than reflecting compensation for physical, mental, and emotional stress, too often reflect the passions of the jury or the disproportionate skills of counsel.

Yet a means exists to create the guidelines. Legislatures are uniquely capable of weighing the relative merits of competing issues and the costs to society of uncontrolled noneconomic damages awards. Pain and suffering awards should be capped by law at specific ceilings. Alternatively, legislative standards for compensation should be established, such as basing the noneconomic damages award on a set percentage of the award of economic damages.<sup>10</sup>

A similar problem exists with regard to the award of punitive damages. These awards serve an important deterrent function. Under the present system, however, there is potential for abuse in such awards. In most states, there are no limitations on the amount of punitive damage awards or the number of times they may be assessed against a particular defendant. Though such damage awards are intended to punish the defendant and deter further wrongful conduct rather than compensate the victim, punitive damage claims are routinely inflated to a point incommensurate with punishment for intentional wrongdoing. Punitive damages thus become just another category whereby the plaintiff can be further enriched. The jury is left to speculate, and the amount awarded is unpredictable. In some cases the punitive damages award is wildly out of proportion to the entire cause of action. Limits or restrictions should be considered for the assessment or amount of punitive damage awards and on the payment of such damages to a plaintiff.

Providing rational guidelines for damage awards is an important element in solving the current litigation crisis. To truly alleviate the crisis, however, tort reform must be coupled with efforts to reduce delay and litigation costs.

### III. ELIMINATING UNNECESSARY AND UNREASONABLE DELAY IN RESOLVING CLAIMS

No rational person can justify the incredible delays seen in this country's courts. The court system penalizes plaintiffs by forcing them, in order to receive timely compensation, to settle for less than the economic costs of their injuries. Further, these defendants are

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10. Economic damages reimburse the injured party for medical expenses, costs of repair or replacement of property, loss of earnings or income, and other objectively verifiable monetary losses.

penalized by being forced to pay the high transaction costs associated with delay. In the nation's largest trial court, litigants must wait four years between filing and final disposition of their cases.<sup>11</sup> Perhaps this is an extreme example, but such "horror stories" serve to alert us to problems.

Recently, the National Center for State Courts studied 18 state general jurisdiction trial courts located in urban or metropolitan areas across the country.<sup>12</sup> The focus was on tort disposition time, that is, the time from filing of a claim to its final disposition. In the slowest court, the median tort disposition time was 721 days.<sup>13</sup> Only 51% of the cases were resolved in less than 2 years and 10% of the cases took over 1,750 days or 4 years.<sup>14</sup> Even in the fastest court the median tort disposition time was 317 days.<sup>15</sup> In that same court, 10% of the tort cases took over 654 days, and 6% took over 2 years.<sup>16</sup>

The research showed little relationship between court size and case processing time<sup>17</sup> and virtually no relationship between the utilization of jury trials and case processing time.<sup>18</sup> Delay was not, however, determined to be inevitable. The National Center study showed that when the court accepts responsibility for the pace of litigation and when scheduling and continuance policies make it clear that the court has the capacity to hold trials at the time scheduled, the system can be more efficient and effective. It is also clear that additional resources should be made available to the courts when necessary.

An example makes the point vividly. Phoenix, Arizona, the court with the shortest tort disposition time, has the most comprehensive civil case management system of any of the jurisdictions studied.<sup>19</sup> What began there as an experiment in civil delay reduction developed into a court-wide system aimed at reducing total civil

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11. The average period to resolve claims in Los Angeles County is over four years. Telephone interview with Steve Carroll, Deputy Director of the Rand Corporation Institute for Civil Justice (May 1986).

12. B. MAHONEY, L. SIPES & J. ITO, *IMPLEMENTING DELAY REDUCTION AND DELAY PREVENTION PROGRAMS IN URBAN TRIAL COURTS* (National Center for State Courts, 1985).

13. *Id.* at 9, Table II.2.

14. *Id.*

15. *Id.*

16. *Id.*

17. The courts with the fastest median case processing times had 59, 31, and 11 judges. *Id.* at 13, Table II.7.

18. *Id.* at 14, Table II.10.

19. *Id.* at 26.

case processing times to a maximum of fourteen months from filing. The impact of management reforms is clear.

In Phoenix, each case is assigned to a particular judge who is responsible for all aspects of the case from filing until the case is concluded.<sup>20</sup> Discovery must be completed within nine months of filing and a firm trial date is set within ninety days of the certified completion of discovery.<sup>21</sup> Requests for continuances must be made in advance with reasons given. The presiding judge scrutinizes those reasons and though initial continuances are not uncommon, second continuances are rare.<sup>22</sup> *Pro tem* judges and permanent judges who do not have a trial in progress on a particular day form a pool of "back-ups" to ensure that the court can hold trial on the date scheduled.<sup>23</sup> Information on the program is widely circulated and statistics on the program's success are collected regularly.<sup>24</sup>

To further facilitate dispute settlement, courts could lighten their caseload by requiring alternative dispute resolution (ADR) for appropriate cases. ADR can remove from the courts a significant volume of cases not requiring formal judicial declarations. Used as a substitute for litigation or as an alternative to trial after discovery is completed, it would lessen the strain on existing judicial resources. Arbitration, mediation, mini-trials, and pretrial hearings to assist parties in reaching resolutions "can be useful components of an overall delay reduction or prevention effort."<sup>25</sup> These methods can be used regularly and have been used successfully in tort litigation without deprivation of the right to a full trial by jury. The earlier a case can reach settlement, the less judicial resources are wasted and the more efficiently the judicial system can address the problems really requiring its attention.

#### IV. REDUCING LITIGATION COSTS

The costs incurred under the present system must, by anyone's standards, be termed excessive. One of the primary costs can be

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20. *Id.*

21. *Id.* at 25-26.

22. *Id.* at 26.

23. *Id.*

24. *Id.*

25. *Id.* at 19.

I would concur with the findings of MAHONEY, SIPES & ITO, *id.*, that Alternative Dispute Resolution programs will not be a "quick fix" for the current delay problems. Such alternatives to conventional litigation can improve a jurisdiction's overall dispute resolution capacity, but the mere existence of such programs is not, in itself, a cure-all for remedying the problems of backlog and delay.

attributed to the expenses of obtaining legal counsel. For example, in asbestos litigation, 61-63% of every dollar paid out by defendants and their insurers goes for transaction costs—attorney's fees and litigation expenses.<sup>26</sup> After the cost of counsel, one still must consider the cost of processing the cases. The government expenditure, alone, for a jury trial in a federal district court was recently estimated at \$10,466.<sup>27</sup>

Though 80-95% of the cases filed in federal district court are settled before trial, the average expense per case filed is still approximately \$1,740.<sup>28</sup> The judicial expansion of liability without regard to fault, the threat of monumental awards, and the inordinate delays clearly provide incentives to settle. Unfortunately, this may lead to the filing of more and more frivolous suits in hopes of a settlement. As settlements become more probable, it is likely, absent some controls, that more frivolous suits will be filed; and thus the cycle continues. The continual filing and settling of such cases unnecessarily wastes our limited judicial resources, delays or impedes the trial or disposition of all other legitimate cases, and adds to the costs.

Meaningful sanctions against lawyers for undue delay or filing frivolous suits or motions are now available in the federal rules and in some state court rules. They should be imposed rigorously. Such sanctions would discourage protracted litigation in an effort to wear down the opponent. They would also provide an appropriate incentive to settle when, after a case is filed, it becomes apparent that further prosecution will be fruitless.

## V. CONCLUSION

Professor Galanter in his article identifies many of the important purposes of tort litigation, including reformation, deterrence, and compensation for wrongful injuries. Unfortunately, there is little more than a random chance that these purposes will be fully

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26. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 44 (Feb. 1986).

Of every dollar paid out by asbestos manufacturers and those who insure them in a tried asbestos case, only 37¢ represents net compensation to the victim. Defense legal fees and expenses take 33¢ and the remaining 30¢ goes for plaintiff's legal fees and expenses. There is only a slight difference in allocation when the case is settled rather than tried to a conclusion. Net compensation to the victim is 39¢. Legal fees and expenses for the defense account for 37¢ and only 25¢ is expended in plaintiff legal fees and expenses. *Id.*

27. J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM 41 (1983) (estimate assumes one hearing and two conferences during jury trial).

28. *Id.* at 70.

served by the current system. That is the real crisis facing us today. Reforms must be made. If public expression is a reliable indication of public impression and estimations of justice, as Professor Galanter suggests, then the general public has recognized the need for immediate tort reform. Legislatures across the country are taking action to restructure the civil justice system.<sup>29</sup>

The delay and cost involved in the tort litigation system, in themselves, supply ample justification for civil justice reforms even without a "statistical" litigation explosion. Reforms are needed to assure reasonable, timely compensation, to preserve access to the courts for injured parties, and to discourage wrongful conduct. In other words, a system is needed that does not outrage our common sense notions of justice. Regardless of whether or not an increased number of persons seek vindication of their claims in this nation's courts, those who do look to the courts must find there a fair, efficient, and predictable forum.

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29. See *Forty Legislatures Act to Readjust Liability Rules*, N.Y. Times, July 14, 1986, at 1, col. 1. According to this article, just since the beginning of 1986 eight states have modified or abolished existing joint and several liability laws and twelve states have placed limits on the amount a plaintiff can be awarded for pain and suffering. Other states have placed broad limits on all noneconomic damages or intangible losses. Some states have even placed ceilings on settlement amounts. Curbs have also been placed on lawyers' fee arrangements—particularly contingency fee arrangements.