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Dick Thornburgh

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Articles

AMERICA'S CIVIL JUSTICE DILEMMA: THE PROSPECTS FOR REFORM

DICK THORNBURGH*

INTRODUCTION

Despite Judge Learned Hand's oft-quoted observation that "litigation is to be dreaded beyond almost anything short of sickness or death," the United States has become the most litigious society on earth.¹ Our society seems to seek a virtual risk-free environment and when anything goes wrong, the first question commonly asked is "whom do I sue?" Our courts are clogged. Litigation has become increasingly complicated, expensive, and lengthy. Public dissatisfaction with lawyers and our justice system is widespread. While we have not quite reached the stage at which a Shakespearean call to "kill all the lawyers"² is forthcoming, the signs across our society are ominous.

Consider our civil justice system. Tort law in the United States has created what amounts to a liability tax.³ This tax, deriving from tort liability, is imposed on all providers of goods and services and is part of the cost of almost everything we buy.⁴ It directly costs American individuals, businesses, and municipal governments \$150 billion

* Counsel, Kirkpatrick & Lockhart LLP, Washington, D.C. B.A., Yale University; L.L.B., University of Pittsburgh; former Attorney General of the United States (1988-91). The author wishes to acknowledge the substantial contribution to this Article of Elizabeth H. Baird, a 1995 summer associate at Kirkpatrick & Lockhart LLP.

1. In 1989 nearly 18 million new civil suits were filed in American courts—one lawsuit for every 10 adults. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991) [hereinafter PRESIDENT'S COUNCIL ON COMPETITIVENESS].

There are 70,000 product liability suits pending annually in the United States, compared with only 200 in the United Kingdom. KIRKLAND & ELLIS, THE NEGATIVE IMPACT OF PRODUCT LIABILITY ON U.S. COMPETITIVENESS: LIABILITY LAW REFORM REINFORCED BY NEW STUDIES 12 (Washington Legal Foundation, Critical Legal Issues: Working Paper Series No. 43, Oct. 1990) (citing Gary T. Schwartz, *Medical Malpractice and Products Liability: A Comparative Legal Assessment* 39-40 (1990) (Brookings Institution Symposium)).

The United States has 30 times more lawsuits per person than Japan. *America's Legal Mess*, U.S. NEWS & WORLD REP., Aug. 19, 1991, at 72.

2. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2.

3. Peter W. Huber, *Flypaper Contracts and the Genesis of Modern Tort*, 10 CARDOZO L. REV. 2263, 2263-65 (1989).

4. Part of the tort tax is also paid through the reduced availability of goods and services. *To Reform the Federal Civil Justice System, To Reform Product Liability Law: Hearing on H.R. 10 Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 100 (1995) [hereinafter

per year.⁵ The tax is collected through litigation.⁶ It represents as much as thirty percent of the price of a stepladder,⁷ over ninety-five percent of the cost of childhood vaccines,⁸ one-quarter of the price of a ride on a Long Island tour bus,⁹ one-third the cost of a small airplane,¹⁰ and actually exceeds the cost of making a football helmet.¹¹ Potential tort liability has temporarily closed the "Cyclone" at the Coney Island Amusement Park, several public beaches, and a number of ice-skating rinks.¹² It has curtailed Little League games,¹³ fireworks displays, evening concerts, and sailboard races.¹⁴ It will soon cost large municipal governments as much as they spend on sanitation or fire services.¹⁵

The focus of this Article is on common-sense reform of our civil justice system, an issue that has come to center stage both in Congress and in many state legislatures. The public has expressed concern and outrage over excessive verdicts such as the infamous \$2.7 million verdict against McDonald's for serving dangerously hot coffee,¹⁶ and the \$4 million punitive award tacked on to a \$4000 verdict for an undisclosed touch-up paint job on an Alabama BMW.¹⁷ Ideals such as pro-

Hearing on H.R. 10) (statement of Patrick J. Head, Vice President and General Counsel, FMC Corporation).

5. ROBERT W. STURGIS, *TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE* (1995).

6. Huber, *supra* note 3, at 2264.

7. PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 3 (1989).

8. "[I]n 1982, the private sector cost of immunizations for a two-year-old was \$20.17. Ten years later . . . the cost of a complete regimen of vaccinations has risen to \$188.19, with the federal liability tax constituting 12.5% of that price." *The Vaccine Outlook*, WALL ST. J., Feb. 23, 1993, at A20 (editorial).

9. Huber, *supra* note 3, at 3 (citing Robert Hanley, *Insurance Costs Imperil Recreation Industry*, N.Y. TIMES, May 12, 1986, at A1).

10. *Id.* (citing *General Aviation Tort Reform Considered*, THE EXECUTIVE LETTER, INS. INFO. INST., Aug. 18, 1986, at 1).

11. *Id.*

12. *Id.*

13. See generally U.S. Rep. John E. Porter, *Volunteer Immunity: Prodding the States*, in STATE CIVIL JUSTICE REFORM, 63, 64 (Roger Clegg ed., 1994) (discussing a suit that eventually settled for \$125,000 filed against volunteer Little League coaches after a player was injured by a fly ball hit into the outfield).

14. Huber, *supra* note 3, at 4.

15. *Id.*

16. The total damages were later reduced to \$640,000. Benjamin Weiser, *Tort Reform's Promise, Peril: Legislation Could Mean Tight Limits on Liability*, WASH. POST, Sept. 14, 1995, at A1. The punitive damages awarded represented \$400,000 of the total. *Id.*

17. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *rev'd*, 116 S. Ct. 1589 (1996). The punitive award was later cut in half by the state supreme court. *Id.* The United States Supreme Court overturned the award as grossly excessive in violation of due process. *Gore*, 116 S. Ct. at 1604.

portionality and justice have been replaced by what amounts to a legal lottery.

Many Americans appear to think that issues of civil justice reform are only for the judges, the lawyers, and the academics. Ordinary citizens find it difficult to relate controversy over legal principles and concepts to their everyday lives. I want to suggest, however, that fundamental principles of this debate are found in three basic areas: enhancing our economic competitiveness and ensuring job security; preserving our health care system and the viability of medical research; and guaranteeing to all citizens their right to a day in court. All of these interests are adversely affected by the present shortcomings in our civil justice system.

This Article will lay out some specific areas where I think reform in our civil justice system is necessary to protect these interests. Part I targets the problems, including the burdens on American competitiveness, the domestic health care system and litigants' rights. Part II focuses on solutions.¹⁸

I. THE PROBLEMS

More than any other area of law, tort liability reflects society's prevalent moral, technological, ideological, and economic conditions.¹⁹ Because there are financial, cultural, and justice interests in conflict, tort law is highly vulnerable and responsive to change.²⁰ First, the substantial financial interests of both business and trial lawyers are placed at the fore the moment one begins to talk about reform of the legal system. Second, cultural issues are presented: our quest for a risk-free society and the emergence of the so-called victim syndrome. Finally, tort law must serve the underlying goal of the search for justice under the rule of law—the redress of wrongs must

Another noteworthy case involves a Maine golfer who accidentally hit herself in the face with her own golf ball. The ball ricocheted off railroad tracks on the golf course and hit her in the nose. She collected \$40,000. *Hooking a Tort*, WALL ST. J., July 20, 1995, at A12 (editorial).

18. Most of these recommendations, not surprisingly, were framed and proposed by the Bush Administration while I served as Attorney General in the *Agenda for Civil Justice Reform in America*. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, *passim*. The Council report stated the following goals for civil justice reform: (1) swifter justice; (2) reduced costs of litigation; (3) greater choice in methods of resolving disputes; and (4) maintaining the integrity of the justice system. The House of Representatives passed many of these suggestions as part of the Republican "Contract with America," and some were approved in the Senate as well. All are based on common sense and deserve serious consideration. These goals will serve as a framework for Part II of this Article.

19. PETER H. SCHUCK, *TORT LAW AND THE PUBLIC INTEREST* 18 (1991).

20. *See id.*

continue to be a priority for our society. The ultimate goal is to resolve these seemingly conflicting interests. I focus first on the three specific problem areas mentioned and consider some ways in which we might address them.

A. *Enhancing Our Economic Competitiveness*

First, let us examine the primary thesis of the report prepared for the President's Council on Competitiveness.²¹ The defects in our civil justice system have had a harmful effect on our economic competitiveness and, in turn, on our economic growth and our ability to create and retain jobs.²² Litigation constitutes a hidden tax on the American economy. It not only increases costs to American consumers, but it impedes our international competitiveness.²³ A good example of this flaw in the tort system is product liability litigation.

1. *Product Liability*.—The civil justice system wreaks a self-inflicted competitive disadvantage on the American economy. According to a study by the Wharton School at the University of Pennsylvania, product liability litigation was estimated to add \$1.6 billion annually to the cost of doing business in Pennsylvania alone.²⁴ In order to remain competitive, manufacturers need as much stability in their costs as possible—including predictable liability costs, something that is impossible under the current system.

The threat of liability coupled with the uncertainty of outcomes hurts U.S. industry and, consequently, U.S. consumers and the entire

21. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 1-3.

22. Three prominent non-lawyers explore this theme in recent books about problems in the American economy. See PETER PETERSON, *FACING UP* 182 (1993) (observing that product liability is the area of the law that poses the greatest threat to American competitiveness and overall economic prosperity); EDWARD LUTTWAK, *THE ENDANGERED AMERICAN DREAM* 217-18 (1993) (noting that demonstrating compliance with regulations may cost more than actual compliance); MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 649 (1990) ("[P]roduct liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly . . . product liability suits. The existing approach goes beyond any reasonable need to protect consumers, as other nations have demonstrated through more pragmatic approaches.").

23. See PETERSON, *supra* note 22, at 182.

24. PETER LINNEMAN & DANIEL INGBERMAN, *PRODUCT LIABILITY LAW: THE ECONOMIC IMPACT ON PENNSYLVANIA* 8-9 (1989). The American public pays the ultimate price. As one commentator asserted:

In each manufacturing industry subjected to sustained courtroom assault—prescription drugs, vaccines, contraceptives, sporting equipment, small planes, small cars, insulation materials—products that represent a valuable choice over some of the remaining alternatives have either been driven off the market or not introduced for fear of liability, with increasingly tragic results for the public health.

WALTER K. OLSON, *THE LITIGATION EXPLOSION* 6-7 (1991).

economy. Consumers and businesses in this country spend \$80 billion annually on litigation and liability insurance premiums.²⁵ A 1984 U.S. Department of Commerce study revealed that foreign competitors often face product liability insurance costs twenty to fifty times lower than those faced by U.S. companies.²⁶ The huge volume of litigation has added sizable costs to consumer goods.²⁷

2. *Innovation*.—The indirect costs are inestimable. One survey of manufacturers and retail firms showed that forty-seven percent had discontinued products,²⁸ twenty-five percent had discontinued or curtailed research,²⁹ fifteen percent had laid off workers as a direct result of product liability experience,³⁰ and eight percent had closed plants based on actual or anticipated liability costs.³¹ The threat of liability has significantly inhibited the product development and innovation³² needed to provide improved services to consumers and to assure a leadership role for our economy worldwide.³³

B. *Health Care*

A brief look at our health care system illustrates the necessity for reform. Here, the civil justice system plays a large role, specifically in the field of medical malpractice. The purpose of a medical liability system is to deter negligent practice.³⁴ The goal of the system should be to minimize the total social cost of medical injuries as defined by

25. HUBER, *supra* note 7, at 4.

26. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 3.

27. For example, an automotive liability of over \$6 billion per year is meted out as a 5% per car cost to American consumers. KIRKLAND & ELLIS, *supra* note 1, at 18 (citing Murray Mackay, *Liability, Safety and Innovation in the Automotive Industry* (1990) (Brookings Institution Symposium)).

28. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 3; *see also* Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167, 199-201 app. A (listing discontinued product lines).

29. *See* Cortese & Blaner, *supra* note 28, at 201-02 (listing examples).

30. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 3.

31. *Id.*; *see also* Cortese & Blaner, *supra* note 28, at 198 app. A (discussing WEPCO, Inc., a company that manufactured driving aids for the disabled, forced out of business because it could not obtain product liability insurance, even though it had never been sued and was certified by the Veteran's Administration).

32. For example, Monsanto did not market an already patented phosphate fiber asbestos substitute because of the liability risk. Cortese & Blaner, *supra* note 28, at 201.

33. A nation's economic growth is determined by the rate of growth of labor and capital, and the rate of technological advances and productivity improvement. Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 19, at 127, 148-49.

34. Patricia M. Danzon, *Malpractice Liability: Is the Grass on the Other Side Greener?*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 19, at 176, 177.

the actual costs of the injury, plus prevention and litigation.³⁵ Instead, it has raised insurance premiums and with them overall health care costs, forced many doctors to curtail their practices, and fostered more defensive medicine.³⁶

1. *Medical Malpractice.*—In the late 1960s and early 1970s, the explosion of claims filed against physicians and the dramatic acceleration in the size of awards and settlements led most insurance carriers to curtail their medical liability coverage.³⁷ As it became too difficult to predict future claims and to calculate the premiums required, commercial carriers withdrew from the market.³⁸ Disruption of medical services became a real possibility in some states, as certain medical services became unavailable, particularly in rural counties.³⁹ Physicians, working with state medical societies, began to form their own medical liability insurance companies. These not-for-profit companies are now the major force in the medical malpractice insurance market, and cover more than half of the self-insured physicians in this country.⁴⁰

As medical malpractice claims spiraled again in the 1980s, so too did liability insurance premiums.⁴¹ Some physicians were paying hundreds of thousands of dollars a year for liability coverage. Annually, the estimated cost of liability insurance for doctors and health care facilities alone is over \$9 billion.⁴² This crisis compelled many of them to eliminate high-risk procedures and high-risk patients from

35. *Id.*

36. High health care costs spill over into other industries. The Chrysler Corporation estimates that liability costs add \$700 to the cost of each car to cover employee health care costs. That is double what French and German automakers pay and triple what Japanese producers must add. THE CONFERENCE BOARD, *PRODUCT LIABILITY: EVOLUTION AND REFORM* (June 1989).

37. Martin J. Hatlie et al., *Health Care Liability: Reform in a Changing Environment*, in STATE CIVIL JUSTICE REFORM, *supra* note 13, at 35, 44-45; see also Danzon, *supra* note 34, at 177.

38. Hatlie et al., *supra* note 37, at 45.

39. *Id.*

40. *Id.*

41. *Id.* During the period from 1975 to 1986, claim frequency per 100 physicians rose at an average rate of at least 10% per year, with a particularly sharp increase from 13.5 claims per 100 in 1982 to 17.2 per 100 in 1986. Danzon, *supra* note 34, at 179. The average amount paid per claim rose at twice the rate of the Consumer Price Index from 1975 to 1984. *Id.* From 1994 to 1995, there was a 40% increase in the median award in medical malpractice cases. Henry J. Reske, *Tort Awards Increasing*, 82 A.B.A. J. 26, 26 (May 1996). Over half of U.S. physicians now have at least \$1 million in coverage. Danzon, *supra* note 34, at 180. More medical malpractice suits were filed in the decade ending in 1987 than in the entire previous history of American tort law. HUBER, *supra* note 7, at 9.

42. Hatlie et al., *supra* note 37, at 46.

their practice.⁴³ One result has been that in some states family physicians refuse to practice obstetrics.⁴⁴ Ultimately, the cost of these premiums gets passed on to the patients; for example, in Florida, \$1119 goes to pay for liability insurance for each baby delivered.⁴⁵

2. *Defensive Medicine.*—Defensive medicine is the label given to unnecessary or redundant medical procedures that are ordered out of fear of a malpractice claim. These practices add further costs to our health care bill. The unpredictability of both liability standards and the size of damage awards has created an incentive for physicians to overcompensate and contributes significantly to the rise in health care costs.⁴⁶ Defensive medicine had an estimated cost of \$25 billion in the United States in 1991.⁴⁷ Seventy-eight percent of physicians confirm that the threat of liability leads them to order tests that they would otherwise consider unnecessary.⁴⁸ The specter of liability thus creates an enormous obstacle to affordable health care.

3. *Product Liability.*—Product liability concerns have forced the withdrawal of drugs and medical products from the market. The drug Bendectin, a morning sickness remedy, was pulled from the market because the annual \$20 million in sales could not support the annual \$18 million cost of litigation and insurance.⁴⁹ The pertussis, or whooping cough, vaccine was developed to prevent what had been the leadingcrippler and killer of children before its introduction in the 1940s. By 1985, seven of the eight manufacturers of the drug withdrew it from the market because of lawsuits.⁵⁰ A liability fund, financed by the increased cost of the vaccine, was finally established to prevent a shortage.⁵¹ A similar climate of uncertainty has discouraged research for an AIDS vaccine as many companies have delayed or

43. Danzon, *supra* note 34, at 194. A survey conducted in 1986, after the sharp premium increases of 1985, showed that about 20% of physicians reported that they had dropped high-risk procedures as a response to liability. *Id.*

44. Hatlie et al., *supra* note 37, at 46.

45. *Id.* at 45.

46. Danzon, *supra* note 34, at 196.

47. Hatlie et al., *supra* note 37, at 46 (citing LEWIN-VHI, ESTIMATING THE COSTS OF DEFENSIVE MEDICINE (Jan. 27, 1993)).

48. Danzon, *supra* note 34, at 46.

49. W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 19, at 105, 112. The truly astounding fact is that a product liability recovery was never successfully obtained from the manufacturer. *Id.*

50. Hatlie et al., *supra* note 37, at 47.

51. *Id.*

abandoned clinical trials of promising substances because of fear of liability.⁵²

C. *Civil Justice—Litigants' Rights*

The rights of the litigants also must be recognized. Two problems—the time it takes to get a case to trial⁵³ and the relatively low percentage of the recovery that goes to the injured persons⁵⁴—must be resolved. Victims, as well as defendants, have an interest in the predictability of compensation for their injuries. This element is lacking under the current system. No one can give victims any assurance as to whether they can get compensation, when it will be paid, or how much it will be.

The reforms suggested by the Competitiveness Council and in this Article are directed at fixing the process of resolving disputes, not altering the substantive rights of any person to assert any meritorious claim.⁵⁵ They are nearly all procedural in nature. These proposals are intended to open more doors for people to assert their rights by clearing the way for truly meritorious claims to have their day in court.⁵⁶

II. THE SOLUTIONS

Having noted the problems that are present in the existing civil justice system, it is time to address the manner in which to deal with the shortcomings. Solutions are available, and some general areas in which reform should be considered are discussed below.

52. *Id.*; see also Jon Cohen, *Is Liability Slowing AIDS Vaccines?*, SCIENCE, Apr. 10, 1992, at 168.

53. According to a study by the U.S. General Accounting Office (GAO), it takes the average product liability suit more than two and a half years to go from complaint to verdict and costs an average of \$168,000. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES (Sept. 1989).

54. KIRKLAND & ELLIS, *supra* note 1, at 14. The Commerce Department estimates that only 40 cents from each dollar expended in product liability suits reaches the victim. *Product Liability in America: Damage Limitation*, ECONOMIST, Dec. 2, 1989, at 84, 85. According to some estimates, as much as 70% of the product liability awards are consumed in the litigation process. KIRKLAND & ELLIS, *supra* note 1, at 15. This represents an annual multi-billion dollar transfer of wealth to the legal profession. *Id.*

55. Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 560 (1992).

56. *Id.*

A. *Product Liability*

Common-sense solutions are available to address the problems presented by the product liability cases. It is my opinion that a uniform national system is the best way to solve all of these problems.

1. *Federal Law.*—National standards are essential to correcting the flaws in the existing system. A uniform federal law, deriving from the Commerce and Due Process Clauses of the Constitution, should replace the patchwork quilt of separate state laws. The operation of fifty laws in as many states is expensive and has led only to confusion. Tort law is fundamentally interstate in character, and thus the problem lends itself to a uniform national solution. On average, seventy percent of the goods manufactured in one state are shipped out of state and sold elsewhere.⁵⁷ If the injury then occurs in a third state, the issue can become further confused.⁵⁸ Businesses and manufacturers need the certainty and uniformity provided by a federal policy.⁵⁹

A national law would not be contrary to the goal of systematically returning authority to the states. Instead, it reflects the truly interstate and international environment within which most competitive businesses operate today. A national law would help businesses to level the playing field with their foreign counterparts.

a. *A Statute of Repose.*—Because product liability insurance costs are markedly affected by the continued sale of older products,⁶⁰ such a national law should include a statute of repose. This provision would set a time period beyond which lawsuits could not be brought with respect to manufactured products and would create a uniform limitations period, setting a time after discovery of a defect in which a suit should be brought. An example of the problem is machine tools built decades ago but still in use today.⁶¹ Built to the safety standards of their day, typically by now each tool has passed through several owners, each of whom has modified it to accommodate particular needs.⁶² Product liability suits on this type of tool represent over one-

57. *Hearing on H.R. 10, supra* note 4, at 1 (statement of Rep. Henry J. Hyde).

58. Even the most pro-defendant law enacted by a state would have limited effect on in-state companies because the law would help only if the manufacturer was sued in that state.

59. *Hearing on H.R. 10, supra* note 4, at 48 (statement of Charles E. Gilbert, Jr., President, Cincinnati Gilbert Machine Tool Co.).

60. *Id.*

61. *Id.*

62. *Id.*

half of the machine tool industry's lawsuits today.⁶³ Foreign machine tool builders do not face this long-term liability exposure and thus have lower costs.⁶⁴ A statute of repose would level the playing field in international markets for U.S. manufacturers.⁶⁵ Such a provision would reduce industry members' product liability costs by sixty percent.⁶⁶

A national law should also provide a defense if regulatory standards have been met in the design and manufacture of a product,⁶⁷ and a defense if the product was manufactured in accordance with state-of-the-art technology at the time of manufacture.⁶⁸ A large inventory of old products is currently in use and a prospective defendant can do very little to minimize the loss from them.⁶⁹ Furthermore, many chemicals, drugs, and machine tools were originally sold years ago when the dominant product liability law limited the exposure of manufacturers and retailers. Tort reform must address the fact that these products have outlived the legal regime under which they were marketed.⁷⁰ Finally, the law should provide that the wholesaler or retailer should not be saddled with the same liability as manufacturers unless some kind of individual negligence is established on its part.

b. Joint and Several Liability.—Another area of tort law in need of reform is the concept of joint and several liability,⁷¹ and the derivative "deep pockets" theory. Under joint and several liability the-

63. *Id.* (citing ASSOCIATION FOR MFG. TECHNOLOGY, 20TH ANNUAL PRODUCT LIABILITY SURVEY 2 (1995)). While the manufacturers discussed in the testimony report that they almost always prevail in these suits, the litigation is lengthy and costly. *Id.*

64. *Id.* at 52.

65. *See id.* The European Economic Community Product Directive has a statute of repose of ten years. *Id.* at 100 (statement of Patrick J. Head). Fifteen years was the recommended interval in the House bill. *Id.*

66. *Id.* at 52 (statement of Charles E. Gilbert, Jr. (citing ASSOCIATION FOR MFG. TECHNOLOGY, *supra* note 63, at 1)).

67. Punitive damages should not be permitted in cases in which a product met stringent regulatory and testing guidelines such as those mandated by the Federal Aviation Administration and the Food and Drug Administration.

68. If a level of safety chosen is efficient, businesses should not have to act as insurers simply because they have deep pockets. Viscusi & Moore, *supra* note 49, at 105, 124. If insurance were the objective of the tort system without regard to some efficient level of safety, then automakers would have to reimburse all victims of car accidents regardless of causality. *Id.*

69. Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2218 (1989).

70. *See generally* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796 (1983).

71. *See* RESTATEMENT (SECOND) OF TORTS § 875 (1977) ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.").

ories, if more than one defendant is named, even if their liability varies from one percent to ninety-five percent,⁷² all are held accountable for the full 100 percent of the liability regardless of their degree of contribution to the harm.⁷³ Under a theory of joint liability, a defendant can be made to pay damages for injury caused by another party acting totally independently.⁷⁴ Sometimes the party most responsible for the harm is not even a party to the action. That party may be beyond the court's jurisdiction, may have already settled with the plaintiff, or may be bankrupt and unable to pay an award.

The deep pockets theory makes little sense.⁷⁵ Although forty-one states have abolished or limited this doctrine,⁷⁶ it enjoys wide application under federal law.⁷⁷ Apportionment of liability based on the injury caused by a particular defendant is much more equitable. Under the rule of individual liability, there would have to be a specific finding of the degree of contribution to the harm. Liability would go be-

72. Twenty-five years ago, most juries were not permitted to return a verdict in favor of a plaintiff if he was in any way responsible for his injuries. In contrast, in some states today, a company found to be as little as 1% responsible for an accident may be held liable for some of the damages. Amy D. Marcus, *Plaintiffs Strike a Blow to Shift Blame for Accidents Caused by Their Own Acts*, WALL ST. J., Aug. 10, 1990, at B1.

73. See *Walt Disney World v. Wood*, 515 So. 2d 198, 199, 202 (Fla. 1987) (holding, under the doctrines of joint and several liability and comparative negligence, that the defendant was liable for 86% of the damages though only responsible for 1% of the fault).

Rising liability costs have made producing airplanes unprofitable. What is most striking is that faulty airplane designs were not the source of liability burden. Even though private error accounts for 85% of all accidents, the manufacturers of the aircraft are sued in 90% of all crash cases. W. Kip Viscusi, *A Principled Basis for Product Liability Reform*, J. REG. & Soc. COSTS (Nov. 1991). Two general aviation manufacturers slashed their output by between 88% and 98% while their product liability costs rose from \$24 million in 1977 to \$200 million in 1985. Stacy Shapiro, *Tort Costs Hurt Aircraft Manufacturers*, BUS. INS., June 10, 1991.

74. See Peter Van de Putte, *A Red, White and Blue Mess*, WALL ST. J., Apr. 27, 1995, at A14 (discussing his flag company's liability for an individual's injury caused by a flag manufactured and sold by another company).

75. But see John H. Wigmore, *Joint-Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923) (arguing for the relaxation of rules that limit joint liability so that plaintiffs can have access to a broader range of pockets).

76. See Martha Middleton, *A Changing Landscape: As Congress Struggles to Rewrite the Nation's Tort Laws, the States Already May Have Done the Job*, 81 A.B.A. J. 56, 60 (Aug. 1995) (citing data compiled by the American Tort Reform Association; see, e.g., COLO. REV. STAT. ANN. § 13-21-111.5 (West 1989 & Supp. 1995)).

77. See, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 270-71 (1979) (holding that no proportionate-fault rule exists in maritime law); *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988) (holding that joint and several liability exists under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)), cert. denied, 490 U.S. 1106 (1989); *Watts v. Laurent*, 774 F.2d 168, 180 (7th Cir. 1985) (holding that under 42 U.S.C. § 1983 independent actors may individually be held liable for indivisible harm), cert. denied, 475 U.S. 1085 (1986).

yond the degree of contribution only when insolvency of one tortfeasor prevents recovery and the balance can be proportionately shared.

2. *Punitive Damages*.—A main goal of a national tort reform law would be to restrain runaway punitive damage awards.⁷⁸ Punitive damages, now almost routinely claimed in tort litigation,⁷⁹ are considered punishment and not something to which plaintiffs have a right.⁸⁰ Plaintiffs are entitled to be compensated for what they have lost, including both economic and noneconomic losses. Today, the incentive to file frivolous lawsuits is increased by the prospect of a sizable punitive damage award.⁸¹ Even trivial cases with nominal actual damages become difficult to resolve out of court because the plaintiff has no incentive to settle merely for actual damages.⁸²

Limits must be placed on punitive damages to prevent the runaway jury verdicts that have recently plagued our system.⁸³ There is little direct or statistical evidence that specific liability verdicts have led to the development and introduction of substantially safer products.⁸⁴ Factors outside of the tort system, such as government regulation and the reputational concern of producers and providers of goods and services, have had a far greater impact on promoting safety.⁸⁵ The American College of Trial Lawyers and the American Law Institute, two of the most prestigious groups in the legal profession, have recommended a limit on punitive damages that reflects

78. In 1987 the Institute for Civil Justice reported, after examining 24,000 jury trials in Cook County, Illinois, that the average punitive damage award increased, in inflation-adjusted dollars, from \$43,000 to \$729,999 for the periods 1965–69 to 1980–84. This is a real increase of 1500%. The rise has been even greater in personal injury cases. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 6. In California, the average punitive damages award increased from under \$1 million in 1986 to \$6.6 million in 1994. Janet Novak, *Torture by Court*, FORBES, Nov. 6, 1995, at 138.

79. *Hearing on H.R. 10*, *supra* note 4, at 64 (statement of Richard K. Willard). Mr. Willard added, not totally facetiously, that it would "be almost malpractice for a plaintiff's lawyer not to include such a claim." *Id.*

80. See generally Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States* in Haslip, 42 AM. U. L. REV. 1365, 1368-70 (1993).

Furthermore, defendants in tort suits face the possibility of being punished repeatedly by different plaintiffs seeking damages for what might have been the same transgression. Middleton, *supra* note 76, at 61.

81. *Hearing on H.R. 10*, *supra* note 4, at 64 (statement of Richard K. Willard).

82. *Id.* Nor does the plaintiff's lawyer who is often working on a contingent fee basis.

83. See *supra* notes 16-17 and accompanying text.

84. THE BROOKINGS NEWS (The Brookings Institution, Washington, D.C.), June 13, 1991.

85. *Id.*

some multiple of the amount of compensatory damages awarded.⁸⁶ Punitive awards would then be a mathematically derived number or a predetermined sum, whichever is greater.⁸⁷

Punitive damages are quasi-criminal in nature, intended to deter particularly egregious conduct.⁸⁸ Therefore, the standard of conduct for an award of punitive damages should be greater than negligence, closer to intentionally malicious or, indeed, criminal conduct. The burden of proof should provide for clear and convincing evidence of the wrongdoing, not merely a preponderance of the evidence.

3. *Eliminate Frivolous Lawsuits.*—Finally, some inhibition must be placed on the filing of frivolous lawsuits. In addition to limiting the availability of excessive punitive damages, another way to limit frivolous suits would be the adoption of some form of the “loser-pays” or “English Rule.”⁸⁹ Account must be taken of the crushing burden that is often imposed on individuals and businesses by the legal fees they expend in defense of even groundless suits.⁹⁰ Limitations should be built in to ensure equal access to the courts and at the same time encourage pretrial settlements by imposing a market restraint on the litigation process.⁹¹

In addition, Rule 11 of the Federal Rules of Civil Procedure must be amended to provide even stiffer sanctions against attorneys who

86. See generally Victor E. Schwartz & Mark A. Behrens, Haslip *May Alter Tort Claim Strategies*, NAT'L L.J., Feb. 17, 1992, at 23.

87. The provisions pertaining to a cap on punitive damages in no way affect the amount of economic damages that a plaintiff can receive. See generally *Hearing on H.R. 10*, *supra* note 4, at 66 (statement of Richard K. Willard) (discussing the proposed punitive damages cap in H.R. 10).

88. As the New York Court of Appeals stated:

[A]n award of damages to a person injured by the negligence of another is to compensate the victim, not to punish the wrongdoer. . . . [T]he temptation to achieve a balance between injury and damages has nothing to do with meaningful compensation for the victim. Instead, the temptation is rooted in desire to punish the defendant . . . [and] has no place in the law of civil damages

McDougald v. Garber, 536 N.E.2d 372, 374-75 (N.Y. 1989) (citations omitted).

89. The term “English Rule” is a misnomer—it is in fact the “everywhere but in America rule.” See Kenneth W. Starr, *The Shifting Panorama of Attorneys’ Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 189 (1986). The American Rule is a “misfit” among most other nations’ approaches to attorneys’ fee awards. *Id.*

90. See *supra* note 49 and accompanying text. As one article noted:

There were at least 4 claims of \$5 million filed in the Tylenol matter, and at least one claim has already been filed against Sudafed. There is no negligence and no blame in either case, and nothing the manufacturers could reasonably have done to prevent the incidents. The only effect of such litigation is to raise the price paid by consumers for over-the-counter medication.

Paul H. Rubin, *Sudafed’s the Last Thing to Be Afraid of*, WALL ST. J., Mar. 13, 1991, at A14.

91. PRESIDENT’S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 9.

file frivolous lawsuits.⁹² This would be a very effective way to curb lawsuit abuse.⁹³

B. Medical Malpractice

Medical malpractice is the second major health care area that I have identified as a concern. The model for reform proposals in the Bush Administration was California's Medical Injury Compensation Reform Act (MICRA),⁹⁴ which has four very attractive features. First, it controls the "lottery" aspect of medical liability while ensuring all actual losses will be fully and adequately compensated.⁹⁵ While patients can still recover 100% of their out-of-pocket expenses relating to medical negligence, there is a \$250,000 cap placed on noneconomic damages.⁹⁶ Second, MICRA contains a limitation on attorneys' fees, ensuring that patients, not their attorneys, will receive the lion's share of any award.⁹⁷ Third, it includes a provision requiring the jury to be notified of any other source from which the plaintiff has received recovery for economic losses, thereby preventing double recovery.⁹⁸ Finally, under MICRA, funds are provided for periodic payments of future damages in excess of \$50,000—representing either income or medical treatment that may be required at some point in the future.⁹⁹ Under MICRA, physician malpractice payments have gone from the highest in the world to one-third to one-half of those paid by physicians in other states.¹⁰⁰

In response to the high added costs of defensive medicine, it would be wise to consider a feature that exists in Maine, and that was

92. Many of the vital safeguards that Rule 11 once provided were stripped away by the 1993 revisions. Debra T. Ballen, *Congress Off to a Good Start on Tort Reform*, NAT'L UNDERWRITER, Feb. 20, 1995, at 150; see also FED. R. CIV. P. 11.

93. See Ballen, *supra* note 92, at 15.

94. 1975 Cal. Stat. 3949. In 1975, facing the highest malpractice insurance premiums in the world, the California legislature passed relief in the form of MICRA. Hatlie et al., *supra* note 37, at 52-53.

95. Hatlie et al., *supra* note 37, at 53. While in practice the MICRA limitations only affect about 2% of the cases, the effect of screening out the lottery-type awards saves an enormous amount of money. *Id.*

96. *Id.* The \$250,000 ceiling is still much more than any other country in the world allows. *Id.*

97. *Id.* Attorneys are encouraged to settle cases more quickly because they will not benefit financially from lengthy litigation, and they cannot hope for a big lottery-type award. *Id.* at 53-54.

98. *Id.* at 53. Such sources include workers' compensation, disability, and health insurance. *Id.*

99. *Id.*

100. *Id.* at 54. An obstetrician in California may pay \$40,000 in annual premiums while an obstetrician in Florida pays \$152,000 and in New York pays \$94,000. *Id.*

included in President Clinton's original health care reform plan. This feature allows physicians to defend medical malpractice liability claims on the grounds that their professional conduct or treatment complied with approved practice guidelines. The Maine Medical Liability Demonstration Project¹⁰¹ provides practice guidelines that specify recommendations for treatment with regard to diagnoses and procedures.¹⁰² The guidelines, when accompanied by corroborating expert testimony, can be offered in court as evidence of acceptable care.¹⁰³ The goal is to eliminate the need to litigate the standard of care.¹⁰⁴

Maine officials expect the program to decrease physicians' motivation to perform unnecessary diagnostic tests and treatment procedures that lead to increased health care costs.¹⁰⁵ The majority of eligible physicians in Maine have chosen to participate in the project.¹⁰⁶ This program should reduce the number of in-court swearing contests between experts that result from current procedures, and focus instead upon the best practices that are acknowledged within the medical profession.

C. *Reforming the Process*

1. *Case Management.*—Streamlining and acceleration of litigation in both the federal and state courts are key to this aspect of reform. Over ninety percent of all lawsuits are settled. The real question is, when do they settle? If they settle on the courthouse steps just before the trial starts, the system has consumed an excessive amount of time, labor, and resources to reach a result that could have been accomplished much sooner.¹⁰⁷ Reform measures could look to the rigorous case-management techniques employed by judges in the Eastern District of Virginia and their "rocket-docket" approach that moves cases along at a very rapid rate and tolerates little delay.¹⁰⁸

101. ME. REV. STAT. ANN. tit. 24, §§ 2971-2979 (West Supp. 1995).

102. *Id.*; see also Rebecca R. Gschwend, *Medical Specialty Societies and the Development of Practice Policies*, QUALITY REV. BULL. (Feb. 1990).

103. *See id.*

104. GOVERNMENT ACCOUNTING OFFICE, MEDICAL MALPRACTICE: MAINE'S USE OF PRACTICE GUIDELINES TO REDUCE COSTS, HRD-94-8 (OCT. 25, 1993).

105. *Id.*

106. *Id.*

107. Judges actually intervene in a large number of civil cases. In a 1980 nationwide survey of trial judges, over 75% characterized their role as "interventionist" at settlement conferences. Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994).

108. *See* Loren Lieve, *Discovery Reform: Maybe the Best Solution Is No Discovery at All*, 77 A.B.A. J. 79, 86 (1991).

2. *Discovery Reform*.—Over eighty percent of the cost of an average civil lawsuit consists of pretrial investigation of facts through the discovery process.¹⁰⁹ The life of the average civil lawsuit in federal court is fourteen months.¹¹⁰ In 1988 seventy-seven percent of litigators surveyed admitted to having used discovery against their opponents as an economic weapon.¹¹¹

Pretrial depositions, interrogatories, and document demands can consume considerable time and money. The cost of responding to document demands can be astounding—employees must produce documents, attorneys must review them, and then the documents must all be copied and recorded.¹¹² Compelling an early exchange of core documents¹¹³ may enable us to cut down on the amount of time that is spent “fencing” in pretrial maneuvers. Such early mandatory dialogue would eliminate needless filings and delays in the exchange of basic information and reduce both the gamesmanship and the expense.¹¹⁴

The 1993 amendments to the Federal Rules of Civil Procedure, requiring prediscovery disclosure of relevant information without waiting for a request from opposing counsel,¹¹⁵ were a step in the right direction. The new procedures have had little practical impact, however, given that the rules allow district courts to opt out of the new discovery provisions by local rule or court order, or to modify the requirements.¹¹⁶ So far, approximately half of the federal districts have rejected or modified the mandatory disclosure rules.¹¹⁷ This lack of uniformity among federal districts has had unfortunate results, includ-

109. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 3.

110. *Id.*

111. *Id.*

112. *Id.*

113. Core materials include the names and addresses of people having knowledge likely to bear on the claims and defenses, and the location of documents most relevant to the case. Sanctions for failure to respond to such requests would result in the offending party being barred from engaging in any further discovery. *Id.* at 16.

114. *Id.* at 17.

115. FED. R. CIV. P. 26(a)(1).

116. *Id.*; see also Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 *TOURO L. REV.* 7, 87 (1995) (discussing the opt-out provision).

117. See Ron Coleman, *Skepticism Runs Rampant as the Federal Courts' Experiment with Discovery Reform Hits the Two-Year Mark*, 81 *A.B.A. J.* 76, 76 (Oct. 1995) (citing a study by the Federal Judicial Center noting that 28 of 112 federal districts have rejected mandatory disclosure, while 21 have modified the rule); Mark Hansen, *Early Discovery Hits Snag: More Than Half the Federal Courts Modify or Reject New Rule*, 80 *A.B.A. J.* 35, 35 (May 1994) (noting some criticism of the Federal Judicial Center's tally).

ing forum-shopping and satellite litigation.¹¹⁸ These rules should be made uniform throughout the federal system, and similar efforts should be adopted in state courts in order to make our civil justice system more equitable and efficient.

As more than ninety percent of the civil lawsuits in this country are settled or disposed of prior to trial,¹¹⁹ mandatory settlement conferences by judges after an initial exchange of information can also move cases along. The goals would be to identify the areas of controversy and to seek to resolve them at an earlier stage. This would necessitate earlier preparation by the parties, promote settlement, and reduce transaction costs. The new Federal Rules of Civil Procedure encourage settlement by requiring parties in all cases to hold a pre-trial discovery meeting to discuss the claims and defenses in the action, develop a discovery plan, and explore the possibility of settlement.¹²⁰ In addition, alternative dispute resolution (ADR) mechanisms should be encouraged, but not required. These include: (1) early neutral evaluation; (2) mediation; (3) arbitration; and (4) summary jury trials.¹²¹

3. *Remove Judges from Politics.*—Finally, I want to suggest that all states should undertake a maximum effort to remove judicial appointments from the partisan political process. Pennsylvania, for example, is a major offender in this regard. Every judge, from the lowest magistrate to the highest justices of the supreme court, must run for election on a partisan ballot. Voters have no idea for whom they are voting or why. If they do, it is frequently for the wrong reason. A process that takes the judiciary out of partisan politics would go as far as any other single change towards effecting the kind of civil justice reform discussed in this Article.

118. See Coleman, *supra* note 117, at 79 (noting that plaintiffs may consider discovery rules in determining where to file); John C. Koski, *Mandatory Disclosure: The New Rule That's Meant to Simplify Litigation Could Do Just the Opposite*, 80 A.B.A. J., 85, 87 (Feb. 1994) (discussing the strain on the judicial system as parties litigate the parameters of the new rule).

119. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 1, at 7. While many litigants believe the only channels to resolution are formal litigation and informal negotiation, I am an enthusiast of, and I think more emphasis ought to be placed on, alternative dispute resolution (ADR) mechanisms. ADR promotes the settling of disputes away from the courts through contractual provisions or by consent of the parties.

120. FED. R. CIV. P. 26(f); see also Kelleher, *supra* note 116, at 89-92 (discussing the discovery meeting in detail). Like Rule 26(a)(1), Rule 26(f) allows district courts to modify or exempt themselves from this requirement, and several district courts have done so. See *id.* at 91-92.

121. *Id.*

If a system of elected judges must be maintained, then once elected, the judges need to be subject to firm rules governing their conduct on the bench. They in turn must lay down equally firm guidelines for attorney discipline to deal with improper activities, including the abuse of the discovery mechanisms mentioned above.

CONCLUSION

The first wave of change in tort reform was characterized by the medical malpractice insurance crisis of the 1970s and the perception that tort laws favor plaintiffs.¹²² A decade later, the second wave focused on product liability and resulted in most states tightening their rules on joint and several liability.¹²³ The third and current wave of change is upon us. It features debate over the erosion of American competitiveness, the use of the threat of litigation as a weapon, joint and several liability, "loser-pays" rules, and congressional, as opposed to state, action.¹²⁴

The House and Senate took the first steps toward meaningful reform of our civil justice system this year by passing products liability legislation.¹²⁵ President Clinton's veto, however, frustrated the completion of the reform process for now.¹²⁶ Despite this setback, the measure's success in Congress indicates that real progress is possible in the future.

The real issues are not political but relate to a lagging American global competitiveness and a liability system that, at best, makes marginal contributions to product safety and national well-being.¹²⁷ Reform is urgently needed to reflect America's continuing commitment to justice, innovation, and the continuing improvement of American employment and living standards for generations to come.¹²⁸

American lawyers could well heed the admonition of Abraham Lincoln, a crafty and experienced litigator himself, who advised: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time."¹²⁹

122. Middleton, *supra* note 76, at 57.

123. *Id.*

124. *Id.*

125. John F. Harris, *Clinton Vetoes Product Liability Measure; Move Triggers Barrage of Accusations Between White House and Hill Republicans*, WASH. POST, May 3, 1996, at A14.

126. *Id.*

127. KIRKLAND & ELLIS, *supra* note 1, at 30-33.

128. *Id.*

129. Abraham Lincoln, *Notes for a Law Lecture (July 1, 1850)*, in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 329 (Philip Van Doren Stern ed., 1991).

In truth, the real loser from a failure to reform our costly tort laws may be American working men and women. Our lessened ability to compete in world markets and slower economic growth at home will generate fewer high-quality jobs and will result in a decreased standard of living. Defending a system that promotes such a result does no favor to this country or its citizenry.