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SYMPOSIUM

ACCESS TO JUSTICE: CAN BUSINESS COEXIST WITH THE CIVIL JUSTICE SYSTEM?

INTRODUCTION

*John T. Nockleby**

The civil justice system in the United States provides formal

* Professor of Law and Director of the Civil Justice Program, Loyola Law School. This Symposium Issue was sparked by William A. (Bill) Daniels, Esq., of the law firm Mazursky, Schwartz, Daniels & Bradley, who first envisioned a series of live symposia on the civil justice system. Daniels enlisted the support of the Consumer Attorneys Public Education Fund, a program of the Consumer Attorneys Association of Los Angeles (CAALA); the Los Angeles Chapter of the American Board of Trial Advocates (ABOTA); and the Association of Southern California Defense Counsel. Additional major support was provided by Daniels Fine Israel & Schonbuch, LLP; Bonne Bridges Mueller O'Keefe & Nichols; Girardi & Keese; Mazursky Schwartz Daniels & Bradley; Ringler Associates; and a generous anonymous donor. A live Symposium was held at Loyola Law School on October 1 & 2, 2004. The live events are archived at <http://events.lls.edu/cjp>. All participants were invited to submit articles for publication in this Symposium issue. In addition to the leadership provided by Bill Daniels and Steve Goldberg, of the law firm Goldberg & Gille, key organizational energy was provided by: Jack Daniels, Daniels Fine Israel & Schonbuch, LLP; the Hon. Sunny (Rita) Miller, Judge of the Superior Court of Los Angeles; Neville Johnson, Johnson & Rishwain; Amy Solomon, Girardi & Keese; Antony Stuart, Stuart Law Firm; and a score of wonderful legal professionals drawn from all three sponsoring organizations. The Civil Justice Program and Loyola Law School would like to thank all the organizers and participants. In addition, the Executive Board of the *Loyola Law Review* took on production of an additional issue, and we would like to acknowledge the exceptional editorial contributions of the Board. Special thanks to Brianna Fuller (LLS '05), Loyola Law Review Symposium Editor *extraordinaire*, without whose dedication this volume would not have been published.

guarantees that all people have access to the courts. Justice is to be dispensed without regard to station, race or sex. Yet the civil justice system—and particularly tort law—is under sustained attack from some business and political interests. The charge is that tort law exacts too much from business and fails to serve the public adequately. Meanwhile, although the civil justice system permits anyone to file a lawsuit, not everyone has the resources to do so.

This Symposium Issue is devoted to exploring whether the civil justice system has become unduly burdensome to business. The range of opinion presented here is broad, as the goal of the organizers was to provoke debate across the spectrum. The articles in this collection reflect several themes.

One theme reflected throughout is the need to ask probing questions about the civil justice system and of proposals to transform tort law. Tort “reform”—or retrenchment—as a political movement has been underway for thirty years, and it is worthwhile to canvass and indeed challenge the many themes that underlie that concept. Is tort retrenchment a reactionary movement, as urged by some scholars, seeking to win from politicians that which was lost in earlier courtroom battles over the content of tort law? Or, is tort reform a byproduct of the fact that justice and fairness that has become increasingly difficult for business interests to obtain, as suggested by others?

Second, several papers focus on the relationship between civil rights and civil law, especially tort law. Is there a relationship between the two? Is civil rights law—as some have suggested—a branch of tort law? Can tort practitioners learn anything from the civil rights movement?

A third theme explored in these papers addresses the role of the judiciary and the tension between judicial accountability and independence. Where the content of tort law has been politicized, perhaps it is inevitable that judges—who are largely responsible for making and enforcing tort rules—would face heat from the political process. Some political pressure is inevitable—and obvious—such as criticism following a controversial decision. Other pressures, such as gaining re-election or obtaining sufficient money to operate the courts, reflect newer pressures brought upon state court judges in particular who must face legislators every year to beg for budget

funds, and the voters in periodic elections. Recent contested judicial elections demonstrate that selling justice is probably not that much different than selling legislators.

To summarize, the Symposium Issue is divided into three parts:

- I. A consideration of the last thirty years of “tort reform”—or “retrenchment”
- II. The relationship between civil rights and tort law
- III. How controversies over tort law affect judicial independence

PART I. TORT “REFORM”—OR “RETRENCHMENT”?

This segment explores how the tort system has, perhaps by default, taken on a critical role in investigating and adjudicating significant hazards to public well-being. Private tort lawyers zealously representing clients investigate claimed social ills ranging from breast implants to cigarettes to products to chemical spills. Is this appropriate? Should private lawyers be empowered to investigate and bring suit in an effort to transform business practices that allegedly harm members of the public? If private tort lawyers did not bring these claims, would government agencies pick up the slack? Does this system—one that both empowers and rewards aggressive private attorneys seeking damages from business entities—need to be reined in? Is this system responsible for the high prices of goods, services, and insurance?

In an introduction to the controversies over tort law, John Nockleby and Shannon Curreri argue that tort reform is a political movement reacting to several decades of common law judging.¹ Redefining the tort “reform” movement as actually a retrenchment action, the authors examine the contemporary political battles over tort law against the backdrop of earlier social, political, and economic forces that transformed the American civil justice system during the first three-quarters of the twentieth century. These developments include litigating major social harms through the tort system, expanding consumer and employee rights and duties to protect others, recognizing emotional harm as a compensable loss, and the rise in business-to-business tort litigation. The current

1. John Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 *LOY. L.A. L. REV.* 1021 (2005).

political conflicts over tort law are best understood as an effort to retreat from those achievements.

In contrast to Nockleby and Curreri, Professor Mark Geistfeld argues that the pro-plaintiff expansion and pro-defendant contraction dichotomy no longer adequately describes the tort reform process.² Instead, the substantive and procedural requirements of the Due Process Clause of the United States Constitution have emerged as a new reform mechanism. This shift has been limited principally to the realm of punitive damages awards, yet other important tort practices raise many of the same due process concerns that justify the constitutional tort reform of punitive damages practice. As such, Geistfeld argues that the Supreme Court's punitive damages jurisprudence may provide the foundation for a new type of tort reform that forces state courts and legislators to more clearly identify the substantive objectives of tort law, a critical issue that previous tort reform movements have not adequately addressed. Constitutional tort reform would, therefore, reduce the legal uncertainty associated with tort liability and provide more predictable and meaningful liability rules.

The third article carries the bylines of three authors: Steven B. Hantler, Assistant General Counsel for government and regulation at the DaimlerChrysler Corporation, and Mark Behrens and Leah Lorber with the law firm of Shook, Hardy & Bacon L.L.P. Hantler, Behrens, and Lorber argue that in recent years "the American civil justice system has become increasingly inefficient, unfair and unpredictable."³ As a result, they argue, courts are losing their ability to administer justice. The tort system no longer serves the twin goals of compensation and deterrence. The last two decades of economic and social trends have disrupted these goals, revealing a disconnect between the goals and the reality of present day tort law. The authors suggest several other features of the tort system (e.g., increasing costs of litigation, the imbalance between costs and fault, and relaxed liability standards) that undermine the efficacy of the civil justice system. The authors advocate the passage of federal and

2. Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093 (2005).

3. Steven B. Hantler, Mark Behrens & Leah Lorber, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121 (2005).

state legislation along with judicially-adopted reforms to address these concerns.

Floyd Norris, Renée White-Fraser, Neil Vidmar, Nancy Marder, and Michael Rustad each offer alternative perspectives challenging this conclusion. Norris, Chief Financial Correspondent for the *New York Times*, comments that when critics of the civil justice system assert it is doing a poor job, their reaction is too often only to try to limit the ability of the court system to perform that role.⁴ With this perspective, Norris addresses “the alleged crisis in malpractice insurance,”⁵ “thinly veiled suggestions of corruption”⁶ in the tort reform debate, and legislation related to class action litigation. He also addresses issues related to auditors, and the 2002 passage of the Sarbanes-Oxley legislation, with specific reference to the Public Company Accounting Oversight Board. “For the first time,” Norris writes, “auditors know that there is a chance that someone else is going to come along and look at their audit, in detail. . . . [T]hat precedent is one that might be profitably studied by those worried about high premiums for malpractice insurance.”⁷ Norris favors looking outside the civil justice system to seek a better remedy than the one the courts are currently providing to redress wrongs.

The Live Symposium at Loyola brought a number of business leaders to offer perspectives on the impact of tort law on their enterprises. Renée White Fraser, Ph.D., CEO of Fraser Communications, writes from the perspective of a female business owner. Dr. Fraser brings a unique point of view to the debate by reminding readers that, when considering tort reform, critics and proponents alike cannot consider only big business.⁸ The voice of the small and mid-sized woman-owned business contingent must be heard as well. From Dr. Fraser’s standpoint, women business owners view tort liability as creating proper incentives for pro-social behavior. Women tend to examine their place in society holistically and are more willing to take responsibility for any unfair business practices

4. Floyd Norris, *Civil Suits and Business: Are Big Verdicts Really a Deterrent?*, 38 LOY. L.A. L. REV. 1201 (2005).

5. *Id.*

6. *Id.* at 1204.

7. *Id.* at 1208.

8. Renée White Fraser, *A Fresh Business Perspective*, 38 LOY. L.A. L. REV. 1209 (2005).

they commit. In addition, because women business owners are more likely to provide health insurance than any other group, they are sensitive to exaggerated claims about insurance costs driven by malpractice.

Both Neil Vidmar and Nancy Marder address the perceived “crisis” in medical malpractice liability insurance. While emphasizing that he does not challenge the claim of the American Medical Association that in recent years some physicians have experienced severe difficulties in obtaining affordable medical liability insurance, Vidmar focuses on the many hurdles malpractice plaintiffs must overcome in order to receive compensation.⁹ Vidmar finds that the evidence does not support many common arguments made against the malpractice system (e.g., excessive claiming rates; excessive damage awards; “frivolous” lawsuits). Indeed, many negligently injured patients receive no compensation. However, transaction costs are high—for patients, their lawyers, malpractice carriers, and health care providers. Moreover, there is some evidence that patients with relatively less serious injuries are over-compensated while patients with more serious injuries are under-compensated. Vidmar closes by raising a broader public policy issue lurking in the tort reform debate: who should bear the loss of medical negligence—taxpayers or the negligent health care provider?

Professor Nancy Marder addresses another aspect of the tort reform/retrenchment argument: the performance of the civil jury.¹⁰ In Marder’s view, amidst cries for tort reform that focus on high medical malpractice premiums and doctors who threaten to abandon their practice, the civil jury is often identified as the culprit. The charge is that juries award excessive damages, which drives up the cost of medical malpractice premiums. Marder challenges the assumption there is a “crisis” at all and highlights the “quick-fix” solutions adopted by legislatures and the new problems they create. Marder considers why the jury has become a convenient scapegoat, outlines the institutional safeguards that constrain the jury so that it

9. Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries and Taxpayer Interest*, 38 LOY. L.A. L. REV. 1217 (2005).

10. Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOY. L.A. L. REV. 1267 (2005).

does not go awry, and suggests additional tools courts could give jurors to improve the jury's performance.

Professor Rustad argues that there is a "giant chasm" between rhetoric and reality in the area of punitive damages. In a major qualitative study of punitive damages, Rustad provides a comprehensive review of the law of punitive damages in all fifty states. Rustad reaches several conclusions. First, the law of punitive damages is becoming ever more restricted. Since 1979, most states have enacted some form of punitive damages reform. Second, the law of punitive damages varies greatly from state to state, suggesting that punitive damages are not out of control, but that state governments are acting as a laboratory for punitive damages reform. But most importantly in Rustad's view, his study demonstrates that the law in this area is an "iron cage," slowly shifting the balance in favor of corporate defendants by making it increasingly difficult to recover punitive damages.

PART II. TORT LAW AND CIVIL RIGHTS: IS THERE A RELATIONSHIP?

The tort system is typically focused on providing compensation for personal injuries. Often underappreciated is the degree to which tort law and civil rights litigation are related. In contrast to tort litigations, civil rights suits are frequently based in statutes, involve explicit claims of discrimination based on prohibited reasons such as race or sex, and often confront "group" injuries—harms to all persons of an affected class—and thus involve a larger social purpose in eliminating the particular wrong. Furthermore, the group of lawyers who represent each group of plaintiffs is frequently not the same.

However, torts and civil rights injuries share many common characteristics. Some civil rights injuries are statutory torts (e.g., employment discrimination; fair housing act violations; spousal abuse and stalking), and frequently require proof of intentional harm. Others (emphasized by Rick Abel) involve constitutional or statutory claims such as prison reform, voting rights, police brutality, or other claims against the government.

Although common law judges have not always extended rules about assault or intentional infliction of emotional distress to sex-based harms such as sex harassment, they could have done so.

Moreover, while the prototypical tort is an individualized claimant seeking compensation, in recent decades many tort suits have gained class action status, signifying their greater social impact. Indeed, the most significant modern justification for tort law is that it rectifies social wrongs and makes society safer for everyone, including those who never see the inside of a courtroom. Finally, both civil rights and tort plaintiffs typically bring suit against defendants who have greater social and economic power: employers, businesses, and corporations. In that respect their suits often appear strikingly similar.

The papers presented here consider dissimilarities as well as common attributes shared by tort claims and civil rights claims. Professor Richard Abel argues that tort and civil rights laws are potentially powerful allies in the struggle against injustice.¹¹ While both tort and civil rights law offer legal responses for harms to vulnerable individuals committed by generally powerful entities, these two areas of law differ dramatically in many respects. Nevertheless, thoughtful collaboration between these domains can enhance civil rights lawyers' ability to be effective, vigorous advocates for their clients. In his analysis, Professor Abel explores the differences between tort and civil rights jurisprudence and modern practices in the areas of substantive and procedural law, available remedies, attorney profiles, and public image. Despite dramatic differences, Professor Abel suggests that civil rights law can confer legitimacy where tort law falls short, and tort litigation can provide a secure economic base of practice for civil rights lawyers. Professor Abel concludes that if tort and civil rights lawyers are proactive and collaborate, the disadvantaged can enjoy remedies that are collective and prospective.

Professors Martha Chamallas and Jody Armour address issues of gender and race in the context of tort law. Chamallas focuses on a key injustice that infects the tort system: the use of race and gender based tables in damages awards for economic injuries such as future wage losses.¹² Courts in the United States frequently use race and

11. Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421 (2005).

12. Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005).

gender specific data to judge an injured person's future lost earning capacity, especially where the lack of an earning history provides an alternative basis for calculation. This harms women and minorities in two ways: first, it bases damages on historic wages differences that are the result of discrimination; second, it assumes that the wage gap will continue into the future, or at least for the life of the tort victim. Once the assumptions underlying such tables are brought to light, she argues, they will no longer be accepted since using race or gender-linked tables is against public policy and likely unconstitutional. Chamallas concludes that using gender-neutral and race-neutral tables can help ensure that courts do not unwittingly perpetuate discrimination in setting economic damage awards.

Tort law provides one mechanism to balance the cost of avoiding certain harms against the benefit. It therefore provides a natural, but overlooked, way to evaluate restrictions on civil rights. Professor Jody Armour explores this natural alliance between tort lawyers and civil rights lawyers through the lens of racial profiling.¹³ Armour focuses on “rational discrimination”—the idea that that, given crime rates, it is logical to treat persons of a different race differently, to cross the street to avoid a black man out of fear of being a crime victim, or not to wait as long before shooting an ambiguous black man as one who would wait to get information about a comparable white man. Applying the Learned Hand formula to such “reasonable” discrimination, Armour shows how rational discrimination fails to account for the harm suffered by those who are the victims of discrimination—the risk of error involved in statistical generalization, as well as the stigmatization caused by race-based profiling. In Armour’s view, the tort model helps to conceptualize the risks a society should accept in order to protect the civil rights of its citizens.

PART III. JUDICIAL INDEPENDENCE: HOW THE CONTROVERSIES OVER TORT LAW MANIFEST THEMSELVES IN THE CONTEXT OF CONTESTED JUDICIAL ELECTIONS AND LEGISLATIVE HALLWAYS

In the third section, the Symposium addresses several controversial features of the civil justice system that have

13. Jody D. Armour, *Toward a Tort-Based Theory of Civil Rights, Civil Liberties, and Racial Justice*, 38 *LOY. L.A. L. REV.* 1469 (2005).

implications for judicial independence. The American system of adjudication, long the envy of the world, establishes the judiciary as a third branch of government. Judges are appointed (or elected) through a political process, but judges are presumed to be shielded from direct political influence.

In recent years, however, a number of high-profile legislative proposals or attacks upon judges have raised concerns among the judiciary. What is behind the recent spate of election-time attacks upon judges running for reelection? When legislatures establish mechanisms of oversight of the judicial system or slash budgets for courts, do judges feel pressure to compromise principle or to avoid making controversial decisions? Are these tensions inherent in a tripartite government of checks and balances? Or is judicial independence at risk? Many critics of the tort system contend that judges need to be made less independent and more accountable to the political process, through mechanisms such as elections, control of judicial budgets, and enactment of legislation that provides for legislative or executive branch oversight of judicial decisions.

In addressing several of these questions, Professor Anthony Champagne provides a comprehensive overview of “increasingly nasty, noisy, and costly” state judicial elections.¹⁴ At one time, judicial reformers tended to promote merit selection as the best system for selecting judges. Recently some judicial reform advocates have recognized that judicial elections are here to stay, and have adopted a new reform strategy. Champagne proposes reforms such as lengthening the terms of judges, publicly funding judicial campaigns, providing for the rapid filing and disclosure of campaign contributions, setting reasonable limitations on campaign contributions to judicial candidates, providing voter information pamphlets, and monitoring judicial campaign conduct. Champagne concludes that the best way to address the problems associated with these elections is incremental change, rather than systemic overhaul.

But judicial elections are not the only challenges that contemporary political conflicts pose to an independent judiciary. We claim to insulate our judges from the political process, but state

14. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 *LOY. L.A. L. REV.* 1483 (2005).

judges in particular face many challenges arising from the political arena. James Scheppele discusses some of the current issues that tend to increase judicial accountability and limit judicial independence.¹⁵ He questions whether too much emphasis is placed on judicial accountability, which downplays the undesired side effects of a dependent judiciary. Scheppele describes how budget problems and elections place judges in the awkward position of raising money from groups who often expect something in return. He illustrates why judges may fear being removed from office for legally defensible, yet politically unpopular, decisions. Scheppele urges us to consider the central question underlying these issues: to what extent do we want judges to be politicians instead of independent thinkers?

In sum, the articles in this Symposium issue probe the rationales underlying civil justice, and raise important questions about the role of tort law in regulating business enterprises. These articles all make clear that tort law—and increasingly the judiciary—has become far more politicized and controversial. Can business co-exist with the civil justice system? While this Symposium issue won't supply uncontroversial answers to that question, they provide an excellent entry into the debate.

15. James Michael Scheppele, *Are We Turning Judges into Politicians?*, 38 LOY. L.A. L. REV. 1517 (2005).

