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Eliminating personal injury law lottery

By Stephen D. Sugarman



IN THE OLD days, personal injury law focused on people who deliberately hurt others. Making the injurer personally pay money in

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compensation for the harm done seemed only just. It probably was the minimum punishment that a wrongdoer deserved. And in order to calm down the victim and prevent him from retaliating with force, it may have been necessary to provide a prompt legal remedy.

But today, personal injury law is hardly at all about intentional wrongdoing. Assault, rape, murder and the like are primarily the business of criminal law and rarely lead to lawsuits for

money damages — primarily because those injurers ordinarily don't have enough money to make it worth suing them.

Instead, most of the cases in the personal injury law system involve accidents. The most common sources of claims are automobiles and other forms of transportation, consumer products, medical and related services, workplace accidents and accidents that occur on other people's property, such as those caused by slips and falls, fires or

other dangerous conditions. The injurers are usually not people the victim is having a feud with. Rather, they typically are a motorist that the victim was sharing the road with, the victim's own physician or local bus company, or the maker of an item bought at a local store that the victim was using at home, at play or at work.

When someone now files a personal injury lawsuit, rather than obtaining swift justice, he or she often will wind

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up waiting several years before the case is resolved. A victim today rarely can expect to recover directly from an individual wrongdoer. Instead, he or she will recover, if at all, from an insurance company or a large, impersonal enterprise, such as a corporation or government entity.

Moreover, our system today is not a system of individual justice. Instead, it is a lottery. The amount a claimant recovers depends, not so much upon what is really deserved, as upon factors such as whether one can hold out for a larger settlement, who the lawyers are, in what county the lawsuit is brought, whether the necessary evidence happens to be available, how tenacious the defendant's insurance adjuster is, whether the right experts will testify and whether the claim is against a motorist, a corporation or a governmental unit. Unlike the official California lottery, this is one in which we are all forced to play.

And we pay for the personal injury law lottery not only in high premiums for auto and homeowner insurance and in higher prices for products, medical services and transportation, but also in other less evident, but equally important, ways. For fear of unwarranted lawsuits, many competent doctors now won't deliver babies. As a result, pregnant women are greatly inconvenienced. So, too, many reasonably safe products — from light airplanes to sports equipment — have been withdrawn from, or

never introduced into, the market. Research in certain high-tech fields — such as vaccines against childhood diseases and new types of contraceptives — is nearly at a standstill. Because of the personal injury law system, accidents are fraudulently staged, people are induced to lie about whiplash, business executives and professionals are diverted from their regular work, scientists and engineers are demoralized by misguided jury condemnation of the products they design and build, nurses are tied up doing paperwork inspired by defensive medicine, rather than tending to patients, and the list goes on.

Nationally, more than \$100 billion a year is paid out for liability insurance by business, government and individuals. But victims get back only a tiny fraction of that enormous sum. Half or more of the money is ground up in administrative costs — the lawyers on both sides, investigators and other claims processing personnel, insurance company overhead, agents' commissions and insurer profits (when there are profits). The majority of what is actually paid to victims goes either to duplicate existing sources of compensation (health insurance, Social Security and other forms of employee benefits and private insurance) or for pain and suffering.

A conservative estimate, therefore, is that less than 25 cents of every liability insurance premium dollar goes to meet actual financial need. By comparison, 85 cents of every health insurance dollar

usually goes to pay for the medical expenses of the policyholders, and more than 95 cents of every dollar passing through the Social Security system comes back out in real benefits to the elderly, the disabled and the survivors of deceased workers.

Many people believe that victims of other people's negligence are entitled to something for their pain and suffering. But I don't believe this sentiment extends to those who today are generously paid off, not because of their real hurt, but because of the nuisance value of their claim — the fact that it is cheaper for the insurer to pay than fight. Nor do I believe that personal injury law ought, as it now does, make people millionaires for their pain and suffering no matter how badly they are hurt. It would be one thing if some rich individual wrongdoer had to make such payments. But, as we have seen, the tab is actually paid by the public at large (or perhaps in part by the shareholders or employees of large enterprises). Moreover, extravagant pain and suffering awards often now attach to product injury cases where no wrongdoing has been shown. What this means, according to various studies of medical malpractice cases, for examples, is that about half of all the damages that are awarded go to but 2 percent of all victims in

the form of compensation for pain and suffering. When this is compared with the miserly way that our society treats many other equally innocent, but disabled, people, I find the contrast downright embarrassing.

The Reagan administration and many business leaders and insurance executives have said that what we should do about all of this is to curtail victims' rights. Roll back personal injury law to the way it was in the 1950s, they say — when it was much harder to sue and a lot less money was paid out to the victors. (The Bush administration isn't yet active on the issue.) But this highly one-sided reform is misguided, and Ralph Nader and other consumer advocates are right to criticize it. After such changes, the system would still be riddled with waste, and may more people would have their needs go uncompensated. After all, what the

political right sees as an improper expansion of liability law at the hands of liberal judges didn't occur mindlessly.

What judges have seen for the past 25 years of the search for the deep pocket is that the American system of employee benefits and social insurance is disgracefully narrow as compared with nearly all other Western industrial nations. Courts can't really change that, but they can try to fill some of the gaps by using personal injury law as a victim compensation scheme. Although the judges were right to recognize the need, in the end, theirs is an inefficient and inevitably incomplete solution. And the job is not one for judges but for legislatures.

In short, we do need to roll back victims' rights to sue for damages — but only as part of an overall package in which their rights to

compensation from other sources are expanded. This sort of trade-off is not only fair, but also, with much of the waste squeezed out of the system, the money could be used to reach many more victims.

There are many balanced reforms now available for legislatures to choose from. A broad auto no-fault plan based upon the successful New York and Michigan experiences would be one helpful first step, or a desirable portion of a bigger reform. A bill like that is now backed by Assemblyman Pat Johnson, D-Stockton. But the need for change extends well beyond auto accidents. To attack the problem at its source, I believe we should take steps to assure that all workers and their families have good quality health and disability insurance. Were that to happen, then we could fairly and rightly begin to do away with personal injury law. ■