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

quantum 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 See COMPENSATION, Page 4P
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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 can recover, in the end, is 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 it. The personal injury law lottery not only in high premiums for auto and homeowner’s insurance and in higher prices for products, medical services and transportation, but also in other ways evident, but equally important. The costs of being uninsured — the suffering of the uninsured, the costs of caring for the uninsured, the costs of caring for the uninsured — have been withdrawn, 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 commissions and insurer profits are paid off, not because of their real harm, but because of the nuisance value of their claim — the fact that it is cheaper for the insurer to pay than not. 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 pay 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 personal injury cases where no wrong has been done has shown. This means, according to various studies of medical malpractice cases, for example, that about half of all the damages that are awarded go to but 2 percent of all victims. After all, what the political right sees as an improper expansion of liability law at the hands of liberal judges didn’t occur needlessly.

What judges have seen for the past 50 years of the search for the deep pocket is that the American system of employee benefits and Social Security 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 ineffectively 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 for much more.

There are many such 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.