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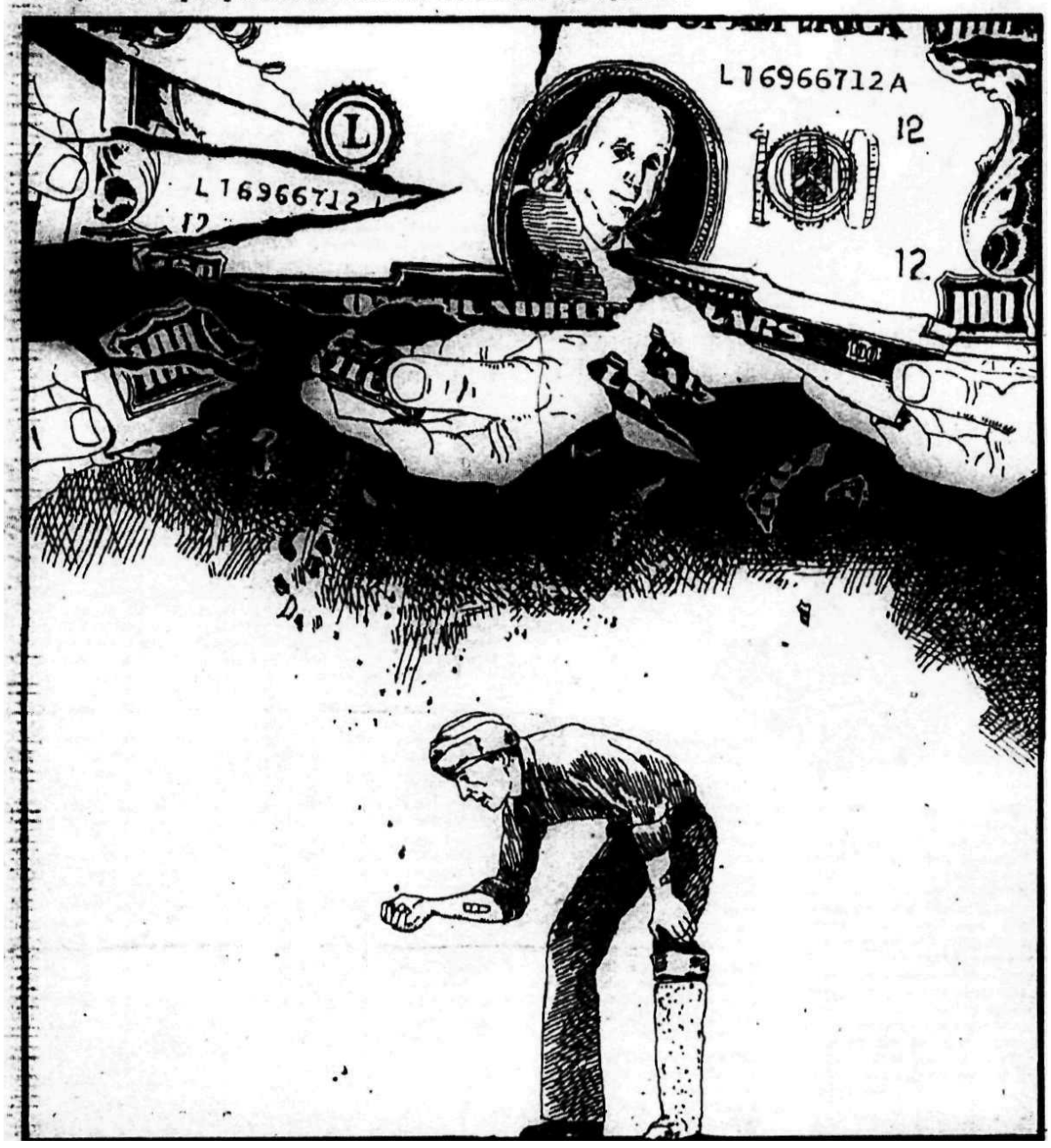

Personal injury law

By Stephen D. Sugarman
Special to The Bee

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BENDECTIN, AN anti-nausea drug, was prescribed to about 30 million pregnant women worldwide between 1957 and 1983. Some claim that Bendectin caused birth defects, and since 1977 hundreds of lawsuits have been filed against its manufacturer, Merrell Dow.

Although the defendant strongly denied that Bendectin was harmful, escalating legal fees and the risk that a jury might see things differently were enough to make Merrell Dow offer to settle all claims for $120 million. It withdrew the offer, however, when a federal appeals court ruled that the settlement could not be binding on those who wished to pursue their claims on their own.

About 1,200 claimants then tried their cases together in a single lawsuit. The jury found that, whatever their injuries, they hadn't proved that Bendectin was responsible. Suddenly, claimants who, under the settlement offer, stood to receive an average of nearly $100,000 each got nothing.

Several individual Bendectin cases have since been tried. Most claimants have lost. But a handful have convinced their jury that Bendectin was the culprit after all. Indeed, in one case the jury awarded a single victim $20 million in compensatory damage and $75 million in punitive damages, although it remains unclear whether any of these winning claimants will ever extract any cash from Merrell Dow, due to further legal complications.

This may make for a fascinating story. But it illustrates what a crazy system we have.

What are the purposes of personal injury law? Defenders of the system point to goals such as compensating victims, punishing wrongdoers, setting standards for personal, business and professional conduct, and preventing accidents.

These are desirable objectives, but personal injury law fails miserably to achieve them. Instead, the current system functions most successfully to employ lawyers and people who work for insurance companies.

FOR THE past 25 years, judges have refashioned liability law so as to give personal injury victims increasing access to deep-pocket defendants (defendants with a lot of resources) as a way of assuring compensation for those hurt in accidents.

This is an understandable judicial response to the American failure to put in place a comprehensive social insurance and employee benefit scheme of the sort that exists in most of western Europe. Judges are often presented with suits by badly injured people against either insured individuals or large enterprises. These defendants are thought to be able to spread the loss, whereas the plaintiff may well be uninsured (and even if not, similar victims are likely to be).

But this sort of social engineering by courts is extraordinarily inefficient. More than half of the more than $100 billion paid annually into the system goes not to victims but to administrative costs — lawyers' fees, adjustors, marketing expenses and commissions, and insurance company profits. Most of the money that victims do obtain goes either for "pain and suffering" or to duplicate other compensation they already have from health insurance, sick leave and disability insurance.

The upshot is that only 15 to 20 cents of our liability insurance

See INJURY, Forum 2

Personal injury law doesn't work

Continued from Forum 1

dollar goes to compensate people for their actual out-of-pocket income losses, medical expenses and other costs. If Social Security or Blue Cross were so inefficient, they would have a revolution on their hands.

Furthermore, most accident victims get nothing from the personal injury law system. Many injurers are broke and uninsured. Many, like hit-and-run drivers, disappear. Often key evidence against a potential defendant is lost, destroyed or never found. Many people don't know their legal rights or are reluctant to sue even when entitled to do so. And accident victims frequently have no one else to blame for their injury.

(Other compensation systems generally pay no attention to fault. For example, your health care covers you even if you get the flu by foolishly drinking from the glass of a contagious friend, or if you carelessly break your leg while playing football at a family picnic.)

Finally, when the personal injury law system does pay out compensation, it doesn't treat similar victims equally. Some get more money because they live in urban areas with more generous juries, because they have a better lawyer, because they can hold out longer for a larger settlement, because they happen upon the right expert witness, because they are up against an inexperienced insurance adjustor or because they are suing that deepest of all pockets, the government.

IN SHORT, as is evident from the Bendectin story, personal injury law is more like a lottery than a coherent system of victim compensation.

Nor does the system punish wrongdoers. Careless drivers almost never personally compensate the people they injure. Rather, their insurance pays. And if they are among the distressingly large proportion of Californians who are uninsured, they probably won't even be sued.

Some drivers face modest insurance rate hikes if they cause accidents (something Proposition 103 seeks to accentuate), but not all companies believe in this practice. They recognize that causing an accident is often the result of a good driver having a bit of bad luck. For this same reason, medical malpractice insurers have traditionally paid little attention to whether a physician has been successfully sued.

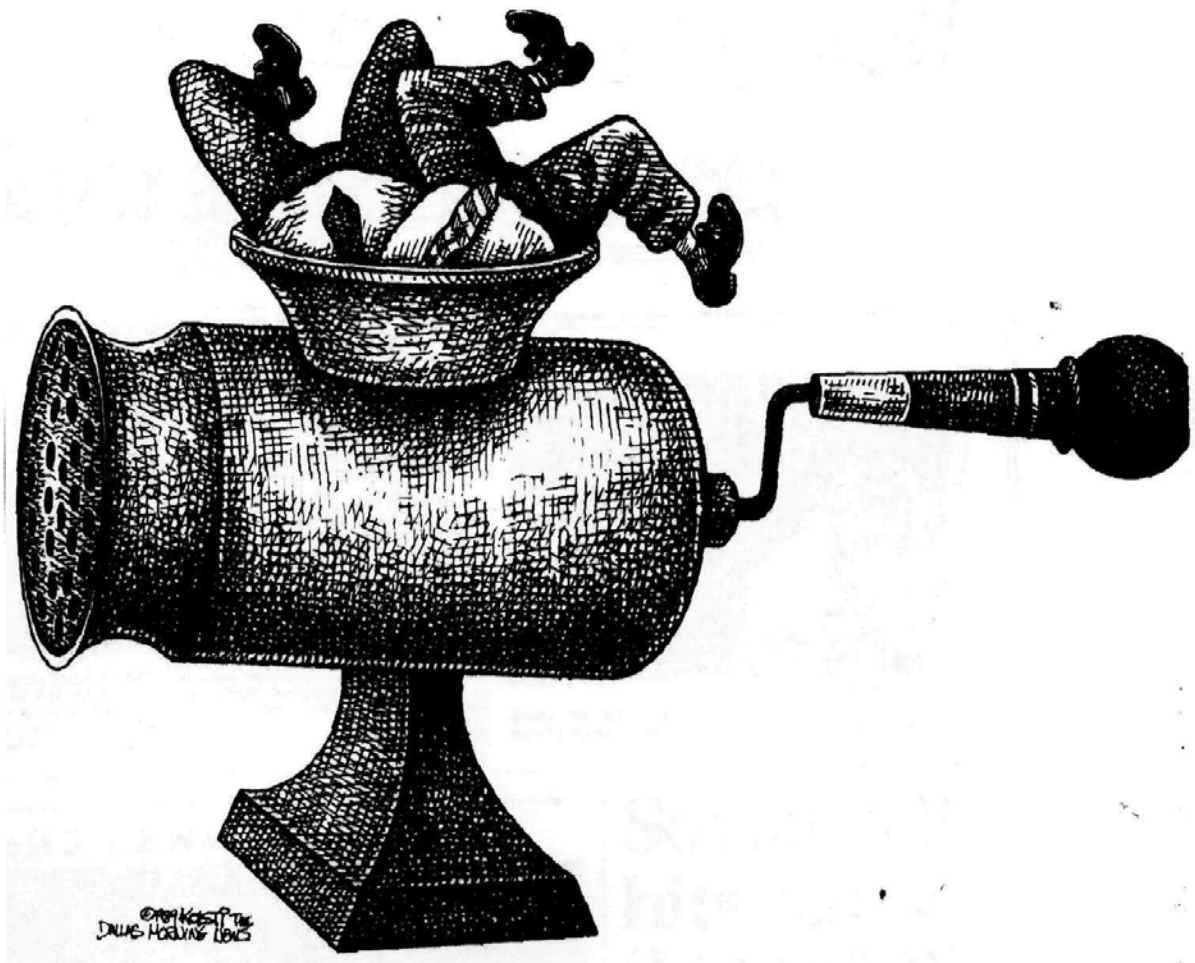
For employees, the point is even clearer. Engineers who misdesign products, assembly line workers who fail to tighten key parts, train engineers who neglect to sound warnings at grade crossings and grocery store clerks who don't clean up slippery spills all cause accidents that lead to personal injury claims. But when those claims are paid, the money comes from the enterprise (or its insurer). Legally, employers can claim reimbursement from their negligent workers. But they don't. Many couldn't afford to pay, and besides, it would be bad for morale to defend a case and then turn around and sock it to the employee when the case is lost.

Who pays then? Probably the company's customers in the form of higher prices for the firm's goods and services; possibly the enterprises' shareholders. In either case, this is hardly punishing wrongdoing. Angry claimants in the Bendectin saga may wish to strike back at someone, but how can you hurt a piece of paper, which in the end is all the Merrell Dow, a subsidiary of Dow Chemical, is?

The personal injury law system also fails to set clear standards of conduct because the overwhelming majority of cases are quietly settled, because those cases that reach trial are mostly decided by juries that don't give reasons for their decisions, and because, as we have seen, different juries hearing the same basic case often come to different results.

Some economists and plaintiffs' lawyers argue that personal injury law's main justification is that it prevents accidents. But in these circumstances, the deterrent effect of the system is highly doubtful.

People have many reasons to be careful quite apart from personal injury law. Drivers fear for their own safety. Businesses don't want to lose sales, which would happen if people thought their products were unsafe. Doctors and engineers take pride in the quality of their work because they have internalized this value as part of being a professional. And, of course, criminal and administrative sanctions await all sorts of wrongdoers — from pharmaceutical companies to airlines, from truck drivers to ski-lift operators. Indeed, the ubiquitousness of regulation in late 20th century America is strong testimony to the failure of personal injury law to control conduct effectively.



TO BE sure, some bad conduct exists nonetheless. But the liability threat seems to play no significant role in reducing that bad conduct. Liability insurance, for one, dramatically dampens the deterrence effect of liability law.

So do ignorance and incompetence. Some people are simply clumsy, possessed of poor judgment, not alert or not very smart — none of which their legal liability is likely to change. And few people know, in any case, what personal injury law requires of them. For example, do ordinary people know whether they can be sued if they serve their social guests too much alcohol? Even employees in sophisticated businesses are frequently in the dark.

Worse, while personal injury law's role in accident prevention is highly uncertain, some of its socially undesirable effects are clear.

For example, doctors increase our insurance costs by ordering extra tests in the hopes of warding off possible malpractice suits, and nurses spend precious time on record keeping that could be better spent on patient care were lawsuits not so prominent in the minds of hospital administrators. Some patients, especially in rural areas, can't even find a doctor near their home to serve them because extraordinarily high malpractice insurance rates have driven competent physicians out of certain specialties. This is especially true for general practitioners who used to deliver babies.

Companies, too, act in ways harmful to the public because of liability fears. Some have cut back on research and new product development. For example, it appears that American drug companies are now doing little to find safer and more effective contraceptives because of their experience with lawsuits concerning these products. It took a special act of Congress designed to replace lawsuits with a specialized compensation scheme to keep America's childhood vaccine industry going.

WHAT IS needed is not simply the reversal of certain personal injury law doctrines and rules of damages, as liability insurers, organized business, physicians and municipal governments have advocated. Rather, the goal should be to replace personal injury law with a modern compensation system.

This is what advocates of generous automobile no-fault plans have in mind. Unfortunately, the insurance industry put to the California voters last year (in Proposition 104) a chintzy auto no-fault plan that included lots of undeserved goodies for the industry. With luck, that won't have killed the public's taste for a better no-fault idea.

Others have offered no-fault proposals for specific accidents — commercial airplane crashes, the side effects of prescription drugs, bus and train accidents, schoolyard accidents, personal injuries from toxic waste and so on.

On a small scale, that's what Congress enacted in the National Childhood Vaccine Injury Act, which provides compensation without litigation to those children seriously injured from the side-effects of vaccines aimed at whooping cough and polio. Similarly, Virginia and Florida have formed compensation schemes meant to replace lawsuits by children suffering from serious birth-related injuries. And there is now in place in high schools across the nation a plan that offers seriously injured athletes a generous disability insurance benefit in lieu of a lawsuit. Thus far, nearly all the claimants have opted for the no-fault award rather than go to court.

However, this ad hoc approach, while a step in the right direction, is bound to lead to gaps and overlaps in victim protection. The long-run solution lies in a far more comprehensive social insurance and employee benefit scheme than we now have.

Although there are several ways to achieve the desirable scope of protection, one sensible and straightforward start can be easily sketched here.

First, California's existing temporary Disability Insurance program ("DI") should be expanded to cover a higher proportion of lost wages than it now does and to reach a higher level of earnings than it now does. And it should apply to both work-related and non-work-related disabilities, instead of only the latter as it does today. Were these changes made, employed Californians would have generous short-term disability income protection (up to one year) for disabilities of virtually any sort.

Second, the California Legislature should pass one of the bills before it assuring that employees and their dependents have access to good quality health insurance as part of their job.

THESE TWO reforms, together with needed improvements in MediCal (California's program for funding health care for the poor), would mean that nearly all temporarily disabled Californians would have no reason to turn either to lawsuits or to the workers' compensation system to obtain generous financial reimbursement for their actual losses. At a stroke, both personal injury and workers' compensation law could fairly abandon what now amounts to more than 90 percent of their caseload.

Note too that under this new package people wouldn't be treated differently, as they are today, because their disability arises from an illness instead of an accident.

This leaves the relatively few seriously disabled victims. Ultimately, their needs, too, should be addressed through expanded health and long-term care insurance and broader Social Security protection.

New Zealand already provides such protection for seriously disabled accident victims, and it appears that it will soon expand its generous compensation net to the disabled in general. Moreover, not only has New Zealand successfully eliminated personal injury lawsuits for accident victims, but also it has found that it has quite enough money in its compensation system to pay, on a no-fault basis, moderate levels of pain and suffering benefits to those who are seriously hurt.

While an expanded social insurance and employee benefit scheme like the one outlined here would clearly cost a great deal of money, the total package — including the elimination of personal injury lawsuits — should not cost more than the present system. Rather, the basic idea is to take the vast sums that now go to administering that system and redirect them away from lawyers and insurance company employees and into the pockets of victims.